Supreme Court, U.S.
FILED
99 689 OCT 19 1999
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY STEWART, ET AL.,
PETITIONERS,

-vs-

JAMES GRANVILLE WALLACE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit err in holding, contrary to *Strickland* and decisions by other circuit courts of appeal, that defense counsel had a duty in a capital sentencing proceeding to investigate and provide facts to the examining mental health experts that those experts do not request?

2. Did the Ninth Circuit err in holding, contrary to *Tamayo-Reyes* and decisions by other circuit courts of appeal, that a state court's refusal to hold an evidentiary hearing in collateral proceedings was itself "cause" justifying an evidentiary hearing and the presentation of new evidence before the district court?

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The opinion of the Ninth Circuit Court of Appeals is not yet published; it is attached as Appendix A. The order of the district court denying Petitioner's petition for writ of habeas corpus is unreported. App. B.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit issued on July 21, 1999. Petitioners timely filed this petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. § 2254(d) (pre-1996 amendment) provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the application for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court, on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

On February 1, 1984, Respondent James Granville Wallace brutally murdered his girlfriend and her two children[1]. Wallace surrendered to the police and confessed to the murders. He refused to cooperate with efforts to formulate defenses in his case and insisted on pleading guilty and receiving the death penalty. His third lawyer, Lamar Couser, complied with his wishes and assisted him in entering his guilty pleas. After a psychiatrist determined him to be competent, Wallace pled guilty to three counts of first-degree murder.

Wallace's mental health was evaluated, before sentencing, by one psychiatrist hired by Couser and by two court-appointed psychiatrists. At the presentence hearing, Couser presented the testimony of Dr. Otto Bendheim, the psychiatrist he had hired to evaluate Wallace, and eight other witnesses. Dr. Bendheim testified that, although he believed that something was wrong with Wallace's mind, he was not insane in the classic sense, nor had he been in a typical dissociative state at the time of the murders. Dr. Bendheim considered detailed aspects of Wallace's background and his own intensive testing in formulating his opinion. In addition to presenting witness testimony at the presentence hearing, Couser argued fervently against imposition of the death penalty. Despite Couser's efforts, the trial court imposed three death sentences. Two of the death sentences were affirmed on appeal, one was remanded for resentencing.

George Curtis, Wallace's appellate counsel, filed a petition for post-conviction relief alleging newly-discovered evidence. At the consolidated hearing on the petition and the resentencing on the remaining murder conviction, Curtis presented the testimony of psychiatrist Dr. David Gurland. Dr. Gurland testified that Wallace had been in a dissociative state at the time of the murders, had an impaired capacity to control his actions, and was acting under an irresistible impulse. The trial court found that Dr. Gurland's testimony would not have justified life rather than death sentences, and denied the petition for post-conviction relief. The trial court resentenced Wallace to death on the remanded murder conviction.

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1. The facts surrounding the murders are described in detail in the opinion of the Arizona Supreme Court affirming his conviction and death sentences, which is attached hereto, in pertinent part, as Appendix C.

Wallace filed a second petition for post-conviction relief in state court, alleging ineffective assistance of counsel at sentencing. Wallace claimed that Couser had rendered ineffective assistance in failing to investigate and present adequate mitigating evidence. In support of that petition, Wallace submitted an affidavit of Dr. Bendheim, stating that when he rendered his diagnosis of Wallace in 1985, he had not known the results of an MMPI examination that had been performed on Wallace in 1984. Dr. Bendheim stated that those results "could have substantially impacted" his diagnosis. Dr. Bendheim did not state the results of the MMPI examination that would have changed his diagnosis. He also stated that when he examined Wallace in 1985, he had not been told about the extent of his dysfunctional family history. Dr. Bendheim opined that further testing would make it "possible" to render a more accurate diagnosis of the mental disorders Wallace "may" have been suffering at the time of the murders. Wallace also alleged that Curtis had rendered ineffective assistance at resentencing by failing to investigate and present adequate mitigation evidence. The trial court found all of the allegations to be "a speculative construct by [Wallace's] attorney," and summarily denied the second petition for post-conviction relief.

In his petition for writ of habeas corpus, Wallace alleged ineffective assistance of counsel at sentencing. He claimed that Couser and Curtis had failed to adequately investigate his family history and failed to adequately prepare the experts to testify. In support of these allegations, Wallace submitted exhibits he had never even attempted to present in state court. He presented affidavits of three new mental health experts, two from Wallace's sisters, and two from attorneys who had represented him before Couser took over his case. Wallace also attached his mother's medical records.

The district court determined that this Court's holding in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), prohibited consideration of these new exhibits absent a showing of cause and prejudice. App. B at 21. The district court reasoned that Wallace had been given ample opportunity to present these exhibits in his first petition for post-conviction relief. Wallace could have presented the affidavits from his sisters and his mother's medical history in support of that petition. Because the trial court had granted counsel's request for the appointment of an expert in the first petition for post-conviction relief, and had also granted an evidentiary hearing on that petition, the district court held that the information contained in the new affidavits from the mental health experts could have been submitted in support of that first petition. Based on the foregoing, the district court held

that it would not consider Wallace's new exhibits absent a showing of cause and prejudice. The district court denied Wallace's petition for writ of habeas corpus without an evidentiary hearing. App. B at 30.

The Ninth Circuit Court of Appeals reversed the judgment of the district court on the claims of ineffective assistance of counsel at sentencing and remanded the case for an evidentiary hearing on that claim. App. A at 14. Citing *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied*, 119 S. Ct. 2414 (1999), and *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), the court of appeals reiterated its position that counsel representing a defendant in a capital sentencing proceeding owes a greater duty to investigate facts on behalf of his client than counsel at the guilt phase. The court of appeals characterized the issue of Wallace's ineffective assistance of counsel claim as follows:

> Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes.

App. A at 9. The court offered its opinion that Couser, and possibly Curtis, had rendered ineffective assistance by failing to give Dr. Bendheim, and perhaps Dr. Gurland, information that they did not request. Thus, although neither Dr. Bendheim nor Dr. Gurland had indicated that they were missing any vital information, or that they were otherwise unable to render opinions, and despite the fact that neither Couser nor Curtis were mental health experts, the attorneys had a duty to discover and provide information to the doctors that the doctors did not even know they needed.

The court of appeals based its opinion on information contained in the new exhibits Wallace had submitted to the district court, which that court had refused to consider under *Tamayo-Reyes*. Citing *Correll v. Stewart*, 137 F.3d 1404 (9th Cir.), *cert. denied*, 119 S. Ct. 450 (1998), the court of appeals held that Wallace had presented a colorable claim of ineffective assistance of counsel in his second petition for post-conviction relief, and that the failure of the state trial court to grant Wallace discovery or an evidentiary hearing on that claim constituted cause under *Tamayo-Reyes*, justifying consideration of the new evidence. In considering the new exhibits, the court of appeals effectively held that the performance of Wallace's counsel could be evaluated, not in terms of what was known and

thought to be reasonable at the time of the representation, but instead in light of opinion testimony that his present counsel have been able to develop in the years following Wallace's second petition for post-conviction relief, using resources that were unavailable to counsel at sentencing. App. A at 15-17.

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REASONS WHY THE WRIT SHOULD ISSUE

The Ninth Circuit's opinion mandates that defense counsel do the impossible in order to effectively represent their clients in capital sentencing proceedings — provide information to an expert that even the expert does not know he needs. In doing so, the court of appeals' decision prohibits defense counsel, in capital sentencing proceedings, from relying on their experts to request information they need to render their opinions.

The decision also materially alters the "deficient performance" prong of the standard for evaluating counsel's effectiveness under the Sixth Amendment. The holding is at odds with the standard for effective performance by counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and conflicts with decisions from the Fourth and Eleventh Circuits. The court of appeals' opinion permits defense counsel's performance to be measured, not by what was reasonable at the time of the representation, but by new evidence unearthed years after a defendant's conviction, sentence, and post-conviction relief proceedings, which violates the "contemporary assessment" rule announced in *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), and conflicts with decisions of the Fourth, Seventh, and Eleventh Circuits.

The Ninth Circuit's decision to consider evidence never presented in state court not only impermissibly alters the standards against which counsel's performance can be measured, it also eviscerates the exhaustion doctrine by eliminating the "fairly presented" requirement, and conflicts with decisions from the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits in that regard. In addition, the Ninth Circuit's holding allowing a state law question to constitute "cause" for a habeas petitioner's failure to develop the evidence in state court is inconsistent with decisions of the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits.

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I

THE NINTH CIRCUIT'S HOLDING REQUIRING DEFENSE COUNSEL, IN CAPITAL SENTENCING PROCEEDINGS, TO DEVELOP AND PROVIDE FACTS TO MENTAL HEALTH EXPERTS THAT THEY DO NOT REQUEST CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS, AND IS CONTRARY TO THIS COURT'S STANDARDS FOR THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. CONFLICT IN THE CIRCUITS.

The Ninth Circuit's decision regarding counsel's duty, in capital sentencing proceedings, to develop and provide information to the experts that they do not request is contrary to the holding of the Eleventh Circuit in *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990). There the Eleventh Circuit held that counsel's failure to provide more information to the mental health expert than the expert had indicated he needed did not constitute deficient performance. *Id.* at 1512. The expert did not indicate that he lacked information with which to make an accurate diagnosis, and, in fact, testified extensively at sentencing regarding Petitioner's mental health problems. Like counsel in *Wallace*, petitioner's counsel possessed reports, at the presentence hearing, from other mental health experts finding petitioner competent to stand trial and not legally insane. There was no indication that the experts felt incapable of rendering opinions based on the information they had obtained from their own testing and examinations. Considering all of these factors, the court held that, at the time of the presentence hearing, counsel "was not on notice that further investigation was warranted," and therefore counsel's failure to investigate and provide more information to the mental health experts than they requested was not unreasonable and did not constitute deficient performance. *Id.* (citing *Strickland*, 466 U.S. at 690–91); *see also Hill v. Moore*, 175 F.3d 915, 926 (11th Cir. 1999) (trial court did not render deficient performance by failing to provide expert witness with information about the defendant's background that the expert was in a position to discover).

The Ninth Circuit's decision regarding the duty of counsel, in capital sentencing proceedings, to conduct investigations in search of facts not requested by their mental health experts is also contrary to the opinion of the United States District Court for the Eastern District of North Carolina, later

affirmed by the Fourth Circuit in *Smith v. Dixon*, 766 F. Supp. 1370 (E.D.N.C. 1991), *aff'd*, 996 F.2d 667, 679 (4th Cir. 1993), *vacated on other grounds*, 14 F.3d 956 (1994). There, the district court held that it was not counsel's responsibility to provide psychiatric experts with information they needed to render their opinions. The court stated that the task of providing experts with the information they need is "appropriately left to the experts" instead of defense counsel. *Smith*, 766 F. Supp. at 1390; *Smith*, 966 F.2d. at 169 (specifically affirming this ruling).

The Ninth Circuit's decision creates a material intercircuit conflict regarding the duties of counsel at capital sentencing proceedings. This Court should grant review to resolve this conflict and to clarify whether counsel has a constitutional duty to render unrequested assistance to experts called upon to opine regarding a defendant's mental health in a capital sentencing proceeding.

B. Distinction between counsel's duties at the guilt and penalty phases and creation of a rigid rule of counsel performance is contrary to *Strickland*.

The Ninth Circuit's distinction between counsel's duties at the guilt and penalty phase is contrary to *Strickland*, where this Court stated that counsel's duties at the sentencing phase of a capital trial are indistinguishable from his duties at the guilt phase. 466 U.S. at 687. Specifically, this Court stated that counsel's role in states where the capital sentencing procedure is an adversarial-type process with strict sentencing guidelines in place[2] is comparable to counsel's role at trial. Therefore, counsel's duties at capital sentencing proceedings "need not be distinguished" from counsel's duties at trial for purposes of performance assessment. *Id.* at 686–87.

The Ninth Circuit based its distinction between the guilt and penalty phases on two cases, *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), and *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied*, 119 S. Ct. 2414 (1999). The Ninth Circuit's rationale for requiring a counsel to possess a heightened level of expertise in the sentencing phase is illogical. Defense lawyers, as a rule, are not mental health experts, and this is equally

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2. Arizona is such a state.

true at all phases of a capital trial. The imposition of a duty on them to possess the skills of a mental health expert, at *any* phase of the proceedings, inflicts an oppressive and insurmountable burden. It also creates a heightened standard for attorney performance at capital sentencing proceedings, which is contrary to *Strickland*.

The Ninth Circuit's decision also substantially alters the reasonableness standard for attorney performance set forth in *Strickland* in that it creates a rigid standard for attorney performance. This Court has clearly stated that "[t]here are countless ways to provide effective assistance in any given case," and that "[i]ntensive scrutiny of counsel and *rigid requirements* for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Strickland*, 466 U.S. at 689-90 (emphasis added); *see also Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) (reiterating this Court's position that there are countless ways to provide effective assistance in any given case; there should be no rigid requirements or per se rules regarding performance of counsel). This Court has stated that counsel has a duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Counsel's decision not to investigate must be assessed "for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* The Ninth Circuit's per se rule of deficient performance of counsel materially alters this "reasonableness" standard.

The distinction between counsel's duties at the guilt and sentencing phases of capital proceedings that the Ninth Circuit has drawn is contrary, in principle, to *Strickland*. It also creates a rigid standard of attorney performance, which materially alters the reasonableness standard set forth by this Court in *Strickland*.

C. THE NINTH CIRCUIT'S RULING VIOLATES THE "CONTEMPORARY ASSESSMENT" RULE AND CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS.

The Ninth Circuit's decision also allows the reasonableness of counsel's performance to be evaluated based on evidence uncovered years after the fact, without any demonstration, by the inmate, that more careful investigation or review by counsel at the time would have uncovered that

evidence. This violates the "contemporary assessment" rule articulated in *Strickland*, and repeated in *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). The "contemporary assessment" rule requires a court deciding an ineffective assistance of counsel claim to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. The Court specifically stated that a fair assessment of an attorney's performance requires "that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 659.

The Ninth Circuit's decision conflicts with the decisions of other circuit courts in this regard as well. *See Fleenor v. Farley*, 47 F. Supp. 2d 1021 (S.D.Ind. 1998), *aff'd*, *Fleenor v. Anderson*, 171 F.3d 1096 (7th Cir.), *cert. denied*, (1999); *Burris v. Parke*, 116 F.3d 256, 259-60 (7th Cir. 1997); *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995); *Poyner v. Murray*, 964 F.2d 1404 (4th Cir. 1992).

In *Burris*, the petitioner used recent opinions rendered by mental health experts to argue that his trial counsel had been ineffective by failing to investigate the possibility of organic brain damage. 116 F.3d at 259. The Seventh Circuit held that defense counsel had not rendered ineffective assistance in failing to investigate the possibility that the petitioner suffered from organic brain damage because none of the evidence available at the time suggested the necessity of further medical examinations. *Id.* The court found that opinions rendered by mental health experts years after the fact were not relevant to the question of whether counsel acted reasonably in failing to investigate further than he did. *Id.* The court held that, given the multiple mental health examinations of the petitioner indicating that he had no mental health problems, and the fact that lay witnesses at the time detected no mental health problems, counsel's failure to investigate the possibility of organic brain damage had been reasonable. *Id.*

In *Fleenor*, the petitioner alleged, based on affidavits of mental health experts never consulted in state court proceedings, that his counsel had rendered ineffective assistance in failing to investigate the possibility of organic brain damage. The court held that those affidavits, prepared years later, and with the benefit of hindsight, did not indicate that the petitioner's counsel had been ineffective. 47 F. Supp. 2d at 1045. The court emphasized that the question presented was not whether the petitioner suffered from

organic brain damage, but whether, in light of all the circumstances at the time, the petitioner's counsel failed to meet "professional standards of reasonableness" in failing to pursue the brain damage issue, based on what he knew or should have known. *Id.* at 1046–47. The court held that, based on what the experts told the petitioner's counsel at the time, counsel did not render ineffective assistance by failing to continue investigating the petitioner's mental health. *Id.* at 1047.

In *Waters*, the petitioner presented affidavits, in collateral proceedings, from some mental health experts who had testified as defense witnesses at the guilt phase, articulating additional testimony they could have given if they had been asked. On appeal, the Eleventh Circuit observed that it was "common practice" for inmates attacking their death sentences to submit affidavits from witnesses "who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions." *Id.* at 1513–14. The court stated that such affidavits proved "little of significance," and only tended to show that, "with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel." 46 F.3d at 1514. The *Waters* court held that the tactic of attacking the performance of counsel by showing what "might have been" violates the *Strickland* rule, stating that a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." 46 F.3d at 1514 (quoting *Strickland*, 466 U.S. at 689).

Similarly, in *Poyner*, the Fourth Circuit held that an attorney does not render constitutionally ineffective performance by failing to produce a witness, at capital sentencing proceedings, who would agree with the "after-the-fact" mental health diagnosis presented, by affidavit, in federal habeas corpus proceedings. 964 F.2d at 1418–19. The petitioner alleged that his counsel had rendered ineffective assistance of counsel in failing to investigate, develop, and present psychiatric evidence as a mitigating factor in capital sentencing proceedings. *Id.* at 1417. To support this claim, petitioner presented an affidavit from a psychiatrist suggesting that the experts who had evaluated him before the penalty phase failed to conduct adequate psychological tests. The Fourth Circuit recognized that, given enough time and resources, defense lawyers will always be able to uncover experts willing to render opinions favorable to their clients. Failure to

uncover these experts, however, when counsel has otherwise investigated his client's mental health, is not ineffective assistance. *Id.*

Wallace is similar to *Burris*, *Fleenor*, *Waters*, and *Poyner* in that Petitioner's mental health had been intensely scrutinized by experts before sentencing, at the request of the trial court and defense counsel, and none of those experts had indicated that they lacked information necessary to render their opinions. There was nothing to put Petitioner's counsel on notice, at sentencing, that more information was needed, or that other opinions might be forthcoming with additional testing and examination. Yet, the Ninth Circuit found that his counsel had rendered ineffective performance, based on current opinions of experts. This Court should grant review in this case in order to resolve the conflict among the circuits regarding whether the reasonableness of counsel's performance must be evaluated based upon what was known or capable of being known at the time of the performance, or whether it can be evaluated based on information discovered years after the fact, through the use of resources not available at the time.

II

THE NINTH CIRCUIT'S DECISION TO ADMIT EVIDENCE NEVER PRESENTED IN STATE COURT EFFECTIVELY NULLIFIES THE EXHAUSTION DOCTRINE AND CONFLICTS WITH RULINGS OF OTHER CIRCUIT COURTS.

A. THE "FAIR PRESENTATION" ELEMENT OF THE EXHAUSTION REQUIREMENT.

Under principles of exhaustion, a state inmate must generally exhaust available state court remedies before filing a habeas corpus action in federal court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). The exhaustion doctrine, which is founded on principles of comity and federalism between state and federal governments, requires that a state inmate "fairly present" his claims to the state courts before federal courts will examine them. *Id.* at 275. "Fair presentation" for purposes of exhaustion has been interpreted to require inmates to raise the substance of their claims in state court, giving the state courts "a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citing *Picard*, 404 U.S. at 276–77). Several circuits have

held that evidence that places claims in a significantly different legal posture must first be presented in state court before it will be considered in federal court in a habeas corpus action. *See Demarest v. Price*, 130 F.3d 922, 932 (10th Cir. 1997) (quoting *Nelson v. Moore*, 470 F.2d 1192, 1197 (1st Cir. 1972)); *Livingston v. Johnson*, 107 F.3d 297, 306 n.7 (5th Cir. 1997); *Mitchell v. Rees*, 114 F.3d 571, 578 n.11 (6th Cir. 1997); *Bannister v. Armontrout*, 4 F.3d 1434, 1439 (8th Cir. 1993); *Mathis v. Zant*, 975 F.2d 1493, 1497 (11th Cir. 1992). This was also the law of the Ninth Circuit before this Court's opinion in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). *See Nevious v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Aiken v. Spalding*, 841 F.2d 881, 883 (9th Cir. 1988).

In *Tamayo-Reyes*, this Court determined the standard a federal court should use when deciding if a habeas corpus petitioner should receive an evidentiary hearing after failing to develop a material fact in state court proceedings. Based on principles articulated in *Townsend v. Sain*, 372 U.S. 293, 313 (1963), *Fay v. Noia*, 372 U.S. 391, 438–39 (1963), *overruled by Stone v. Powell*, 428 U.S. 465 (1976), and *Wainwright v. Sykes*, 433 U.S. 72, 87–88 n.12 (1977), the Court held that a federal court should apply the cause and prejudice standard to determine if a habeas petitioner should be granted an evidentiary hearing in federal court after he failed to develop a material fact in state court. *Tamayo-Reyes*, 504 U.S. at 5.

The Ninth Circuit has interpreted *Tamayo-Reyes* as a repudiation of the "evidence exhaustion" rule found to exist by every other circuit that has examined the issue. In *Correll v. Stewart*, 137 F.3d 1404 (9th Cir.), *cert. denied*, 119 S. Ct. 450 (1998), the court held that the petitioner was entitled to an evidentiary hearing on his ineffective assistance of counsel claim in federal court because he had alleged a colorable claim to that effect in state court, but that court had failed to hold a hearing. The Ninth Circuit held that the state court's failure to hold a hearing constituted "cause" under *Tamayo-Reyes*, excusing the petitioner's failure to adequately develop his claims in state court. The court rejected the state's argument that *Tamayo-Reyes* had not changed the existing law of the federal courts requiring inmates to "fairly present" the substance of their claims, including all

evidence that might place their claims in a significantly different posture[3].

The Ninth Circuit based its decision to consider the new exhibits offered by Wallace on *Tamayo-Reyes* and *Correll*. Citing *Correll*, the court held that Wallace had fulfilled the "cause" requirement of *Tamayo-Reyes* by presenting a colorable claim for relief in state court, where he was denied an evidentiary hearing. Based on this finding of "cause," the Ninth Circuit held that Wallace could present anything and everything he could now find in support of his claim in federal court, regardless of whether he even tried to present it in state court. This holding, and the Ninth Circuit's holding in *Correll*, conflicts, in principle, with *Tamayo-Reyes*, wherein this Court stated that the adoption of a standard that encourages full factual development of a claim in state court "is fully consistent with, and gives meaning to, the requirement of exhaustion." *Tamayo-Reyes*, 504 U.S. at 9. Noting that Congress had incorporated "[t]he requirement that state prisoners exhaust state remedies before a writ of habeas corpus is granted by a federal court" in 28 U.S.C. § 2254, this Court declared: "[e]xhaustion means more than notice. In requiring exhaustion of a federal claim in state court, Congress surely meant that exhaustion be serious and meaningful." *Id.* at 10. This Court went on to state:

> Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the State must afford the petitioner a full and fair hearing on

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3. The only authority cited in *Correll* for the proposition that when a state court denies a request for an evidentiary hearing on a claim of ineffective assistance of counsel, a habeas petitioner has fulfilled the "cause" requirement was *Jones v. Wood*, 114 F.3d 1002, 1012-13 (9th Cir. 1997). However, in *Jones*, the court noted that Washington state courts will *not permit* inmates to rely on extra-record material in arguing ineffective assistance claims. *Id.*; *see State v. McFarland*, 899 P.2d 1251, 1257 (Wash. 1995). The *Jones* court noted that, because extra-record material is frequently crucial in determining the merit of such claims, Jones *could not* have fully developed the facts in state court. *Id.* The holding in *Jones* was nothing more than a finding that the State of Washington lacked a corrective process. Such is not the case in Arizona. Rule 32.5, Arizona Rules of Criminal Procedure requires petitioners seeking post-conviction relief support their petitions with all the extra-record material applicable to their claim. Specifically, the rule provides that petitioners seeking post-conviction relief (which is the procedurally correct means of presenting ineffective assistance of counsel claims in state court), alleging claims based on matters not within the petitioners' personal knowledge, must attach affidavits, records, or other evidence supporting the allegations to the petition.

his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.

Id.

The Ninth Circuit's decision in this case, and in *Correll*, to permit a habeas petitioner to present evidence in federal court that he never even attempted to present in state court circumvents the clear holding of *Tamayo-Reyes*, and is inconsistent with every circuit court that has ruled on the issue. The state courts should have the opportunity to rule on the merits of a claim with both the material facts and legal theories before them.

B. STATE COURT RULING ON A STATE LAW ISSUE SHOULD NOT CONSTITUTE CAUSE EXCUSING FAILURE TO DEVELOP EVIDENCE IN STATE COURT, JUSTIFYING AN EVIDENTIARY HEARING IN STATE COURT.

"Cause" for a procedural default generally involves "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1984). Cause may be established by showing that "the factual or legal basis for a claim was not reasonably available to counsel" or that there was "'some interference by officials that made compliance impracticable.'" *Id.* (quoting *Brown v. Allen*, 344 U.S. 433, 486 (1953)); *see also McCleskey v. Zant*, 499 U.S. 467, 497 (1991) (cause is external impediment such as government interference or reasonable unavailability of claims' factual basis). Ineffective assistance of counsel in state post-conviction proceedings does not constitute cause under federal law. *Coleman v. Thompson*, 501 U.S. 722, 757 (1991) ("Because [petitioner] had no [federal constitutional] right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of [his] claims in state court cannot constitute cause to excuse the default in federal habeas.").

Other circuits, in recognizing the limited nature of "cause," have noted that they will not recognize perceived deficiencies in state-court post-conviction proceedings as a gateway to open hearings in the federal courts. *See, e.g., Eaton v. Angelone*, 139 F.3d 990, 995 (4th Cir. 1998) (federal courts should not supplant the state fact-finding process, state trial on the merits is the "main event," not a "tryout on the road" for later federal proceedings). The Seventh Circuit, in *Wright v. Gramley*, 125 F.3d 1038,

1043–44 (7th Cir. 1997), found that the state prisoner had not demonstrated "cause" for his failure to submit required affidavits in state collateral proceedings. The court noted the difficulties of litigating from prison, but held that the petitioner had not made a sufficient showing to warrant a finding of cause. *Id.*

In *Sellers v. Ward*, 135 F.3d 1333 (10th Cir.), *cert. denied,* (1998), the Tenth Circuit refused to find as cause the misapplication of Oklahoma's post-conviction relief statute by the state courts. The court noted that post-conviction was not constitutionally required, and therefore the error in the state court post-conviction relief proceedings did not excuse the development of the evidence and claim in state court. *Id.* at 1339.

Other circuits have also refused to find perceived errors in the state-court proceedings to be cause for a procedural default. *See Weeks v. Bowersox*, 106 F.3d 248, 249 (8th Cir.), *vacated on other grounds en banc,* 119 F.3d 1342 (1997) (failure of the state trial court to delineate the features of state post-conviction relief proceedings to a petitioner was not cause); *Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995) (rejecting pro se litigant's assertion that his ignorance of the intricacies of state's collateral review statute was sufficient to establish cause); *Malone v. Vasquez*, 138 F.3d 711, 719 (8th Cir.), *cert. denied*, 119 S. Ct. 384 (1998) (neither Missouri prisoner's incarceration in California nor his mental illness constituted cause excusing his procedural default).

The Fifth Circuit, in analyzing whether cause is shown when there is an alleged deficiency in the state post-conviction proceeding, has indicated that only a state procedure incapable of allowing the inmate to present his claim —a complete absence of corrective process—could constitute cause. *Turner v. Johnson*, 106 F.3d 1178, 1183 (5th Cir. 1997); *Andrews v. Collins*, 21 F.3d 612 (5th Cir. 1994).

In the instant case, the state court summarily denied Wallace's second petition for post-conviction relief, which alleged ineffective assistance of counsel. The state court found it simply a "speculative construct" by Wallace's attorneys. A petition for post-conviction relief may be summarily dismissed in Arizona if it fails to state a "colorable" claim under state law. A "colorable" claim is raised if a petitioner raises allegations which, if accepted as true, would entitle him to relief. *See State v. Schrock*, 719 P.2d 1049, 1057 (Ariz. 1986). Arizona law does not require state courts to hold

evidentiary hearings based upon "mere generalizations and unsubstantiated claims." *State v. Borbon*, 706 P.2d 718, 725 (Ariz. 1985). Wallace could have presented his "new" evidence to the state court by submitting the affidavits with his second petition for post-conviction relief. Having failed to do so, it is manifestly unjust for a federal court to review the state court's ruling based on evidence not presented to the state court. Furthermore, regardless of what Wallace could have done but did not, the fact remains that whether a petitioner states a "colorable" claim for relief, entitling him to an evidentiary hearing in state court in collateral proceedings is a matter of state law, which should not be revisited by federal courts on habeas corpus review[4].

The Ninth Circuit's holding that a state court's determination regarding whether a petitioner has presented a "colorable" claim warranting an evidentiary hearing in state-court collateral proceedings can constitute "cause" under *Tamayo-Reyes*, justifying his presentation of new evidence in federal court, is contrary, in principle, with decisions of other circuits, and is inconsistent with the doctrine of exhaustion. This Court should grant review on this issue because materially different interpretations of *Tamayo-Reyes* are of substantial importance throughout the circuit courts.

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4. It is important to note that this position adopted by the Ninth Circuit permitting deficiencies in post-conviction relief procedures to constitute cause under *Tamayo-Reyes* is contrary, in principle, to other Ninth Circuit cases holding that a habeas corpus petitioner's complaints relating to Arizona's post-conviction relief process are simply not subject to federal review. *E.g., Poland (Patrick) v. Stewart*, 169 F.3d 573, 583-84 (9th Cir.), *cert. denied*, (1999); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997), *cert. denied*, 119 S. Ct. (1998); *Villafuerte v. Stewart*, 111 F.3d 616, 632 (9th Cir. 1997).

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

(Cite as: 1999 WL 511348 (9th Cir. (Ariz.)))

James Granvil **WALLACE**, Petitioner-Appellant,

v.

Terry **STEWART**, Respondent-Appellee.

No. 97-99016

United States Court of Appeals,
Ninth Circuit

Argued and Submitted April 22, 1998.

Decided July 21, 1999.

James Belanger, Coppersmith & Gordon, Phoenix, Arizona, for petitioner-appellant.

Colleen L. French, Assistant Attorney General, Phoenix, Arizona, for respondent-appellee.

Appeal from the United States District Court for the District of Arizona; William D. Browning, District Judge, Presiding. D.C. No. CV-91-00315-WDB.

Before: HUG, Chief Judge, and KOZINSKI and T. G. NELSON, Circuit Judges.

KOZINSKI, Circuit Judge:

*1 Petitioner, James Granvil Wallace, pleaded guilty to first degree murder and was sentenced to death. The circumstances of the crime are brutal and undisputed. One afternoon in February 1984, Wallace lay in wait at the mobile home he shared with his girlfriend, Susan Insalaco, and her

two children. The first person to arrive was Anna, Susan's 16-year-old daughter. Wallace struck her repeatedly with a baseball bat, breaking the bat. As Anna lay moaning, he forced the broken bat through her throat until it hit the floor, and then dragged her body into the bathroom. Gabe, Susan's 12-year-old son, arrived next. Wallace struck him repeatedly with a pipe wrench, fracturing his skull and leaving brain matter on the floor. Susan arrived last and he struck her repeatedly with the wrench. Wallace then took money from Susan's wallet, bought some liquor and drank it; he spent the night at a friend's house. The next day he turned himself in to the police. He has reported what he remembers of the murders and has never denied he was the perpetrator. Indeed, he insisted on pleading guilty in order to spare the victims' family the anguish of a trial.

Nothing in the record explains Wallace's violent actions. The senselessness of the tragedy is underscored by the fact that the rational mind can find nothing that Wallace gained by destroying Susan Insalaco and her children. The bizarre circumstances of the crime suggest that Wallace may have been acting as a result of some mental infirmity, which might have constituted a mitigating circumstance under Arizona's death penalty sentencing scheme. Nevertheless, Wallace was sentenced to death for his crimes, and his principal claim in his federal habeas petition is that his

counsel were ineffective to the sentencing court. It is to this question we turn first.

Ineffective Assistance of Counsel

A. Several lawyers represented Wallace in his state court proceedings. Lamar Couser, who was appointed after two previous counsel withdrew, represented Wallace through his guilty plea and initial sentencing. Couser moved for a mental examination, and Dr. Richard Hinton, a court-appointed clinical psychologist, found Wallace competent to stand trial based on a review of police records, the results of an MMPI (psychological profiling) test and a brief interview with Wallace. Wallace then pleaded guilty to the three murders. In the two and a half months between the plea and sentencing, the probation department had two psychiatrists, Drs. Barry Morenz and James Little, examine Wallace. Their joint evaluation, which was included in the presentence report, diagnosed Wallace with antisocial personality disorder and polysubstance abuse, and noted that Wallace's mother "appeared to have suffered from a mental illness of psychotic proportions."

Couser then retained Dr. Otto Bendheim, another psychiatrist, to testify on Wallace's behalf at the sentenceing hearing. However, Couser did not provide Bendheim with Wallace's MMPI results or with any information

about Wallace's background. From his brief interview with Wallace and the presentence report, Bendheim ascertained that Wallace's mother had been mentally ill. Bendheim was unable to diagnose Wallace with any type of mental infirmity and testified that Wallace had been aware of his actions. His only explanation for Wallace's conduct was that "there must've been something that went wrong in [his] mind."

*2 Couser argued briefly for leniency. He mentioned Wallace's "chaotic upbringing" in passing, but focused on Wallace's history of heavy drug use and the possibility that he had disassociated during the murders. The court found one aggravating factor applicable to all the murders: that they were committed under especially heinous, cruel or depraved circumstances. As to Susan Insalaco, the court also found that her murder was committed for pecuniary gain (theft of the liquor money), another aggravating circumstance. With barely a mention of Wallace's mental health, the court found one mitigating circumstance, Wallace's remorse. However, it found this didn't outweigh the aggravating circumstances, and sentenced Wallace to death on all three murder counts.

George Curtis took over as counsel on appeal. He persuaded the Arizona Supreme Court to reverse the pecuniary gain aggravating circumstance and to modify the trial court's findings on the "cruel, heinous or depraved"

aggravating circumstance. The court remanded for resentencing with respect to the mother's murder, but affirmed with respect to the murders of the children. See State v. Wallace, 151 Ariz. 362, 728 P.2d 232 (Ariz.1986). [FN1] Thus, the stakes at Wallace's resentencing were relatively low: Because two of Wallace's death sentences remained in place regardless of the remand, Curtis could not spare his client the death penalty, no matter how persuasive a showing he made as to the murder of the mother. [FN2]

At resentencing, Curtis presented the testimony of a new psychiatrist, Dr. David Gurland. Curtis provided Gurland with police reports and Dr. Bendheim's testimony but gave him no information about Wallace's background or family history. Gurland later claimed that he spoke with Wallace's brother while preparing his diagnosis, but Wallace does not have a brother. Gurland testified that Wallace was in a dissociative state at the time of the murders, and hypothesized that Wallace's psychological problems were rooted in part in his mother's early death, but Wallace's mother is still alive. [FN3] Beyond this flawed account, no witness discussed Wallace's background in significant detail at the hearing. Gurland concluded that Wallace was not able to fully appreciate the wrongfulness of his actions or to conform his conduct to the requirements of law-a mitigating

circumstance under Ariz.Rev.Stat. §13-703(G)(1). Drs. Hinton and Morenz concluded otherwise, testifying for the government that Wallace has not been dissociated at the time of the murders. The court again sentenced Wallace to death, and this time the Arizona Supreme Court affirmed. See State v. Wallace, 160 Ariz. 424, 773 P.2d 983 (Ariz.1989). B. Because Wallace admitted committing the murders and pleaded guilty, the only question left for trial was Wallace's sentencing. Exploring the defendant's mental state and other potential mitigating factors was clearly a central task for his counsel. Yet Wallace's lawyers devoted remarkably little time to this task. [FN4] Of the 45.9 hours Couser spent on Wallace's case, he spent 36 minutes conferring with Dr. Bendheim, and only 1.4 additional hours talking to other prospective witnesses for the sentencing hearing. He did not provide Bendheim with the MMPI results and he did not investigate what Drs. Little and Morenz referred to as Wallace's "very chaotic childhood." This information was easily within his reach: Wallace's three sisters have since signed affidavits saying they would have willingly provided information about Wallace's childhood and testified on his behalf, yet Couser never contacted them.

*3 Curtis spent 45.25 hours preparing for Wallace's resentencing, including only about an hour interviewing witnesses. In his own words, he "conducted no factual investigation concerning ... potential mitigation [ ] or the appropriateness of the death penalty." Curtis Aff. ¶4.

Had they only looked, Couser and Curtis would have discovered a great deal about Wallace's family history, which Dr. Bendheim now describes as "one of the most dysfunctional family environments I have ever encountered." Wallace's mother was in and out of mental hospitals, diagnosed as psychotic, alcoholic and anorexic, among other things. On one occasion, she stabbed her husband in the head with a butcher knife. On multiple occasions, she tried to kill herself. She would disappear for weeks, and her children eventually would find her hidden naked somewhere in the house. On one particularly bizarre occasion, she resurfaced underneath Wallace's bed, naked and kicking so hard the bed bounced up and down. Wallace woke up the household with his screams. Wallace's father, a severe alcoholic, once "cold-cocked" his wife in front of Wallace and "stomped" repeatedly on her neck. Wallace himself sniffed glue and gasoline daily between the ages of ten and twelve, and experienced a "clinically significant series of head traumas" while growing up. Dr. David Lisak, who examined Wallace in 1993, concluded that "[t]he family and

home in which Jim Wallace was raised was marred by an almost unimaginable level of chaos, neglect, bizarre and insane behavior, and by extreme violence between the parents."

The sentencing judge saw only glimmers of this history, and received no evidence about its significance vis-avis mitigating circumstances. Wallace has presented affidavits from three psychiatrists explaining that psychosis and alcoholism are genetically passed from parents to children, and both of Wallace's parents displayed signs of major mental health disorders. Furthermore, children raised in profoundly dysfunctional environments like the Wallace household are prone to develop severe psychiatric disturbances. Indeed, the evidence now shows that Wallace suffers from a "major depressive disorder" and, most probably, organic brain damage.

The doctors who testified both for and against Wallace now agree that their diagnoses were at least incomplete. Dr. Bendheim believes the information about Wallace's family background "would ... have been of vital importance" to his diagnosis, and the "extreme[ly] importan[t]" MMPI results could have had a "substantial[ ] impact[ ]." Dr. Gurland based his testimony primarily on Bendheim's original, admittedly incomplete, analysis. Even the government's experts agree. Dr. Hinton characterizes Wallace's background as "extremely important" information, and now says

he "would have, at the very least, recommended that a full competency examination of Mr. Wallace be conducted." Dr. Morenz now believes that Wallace suffers from multiple mental disorders, and that at the time of the murders, "Wallace's capacity to conform his conduct to the requirements of the law was significantly impaired." In sum, had these experts known the details of Wallace's family background, the substance and tone of the sentencing hearings would have been significantly different. Which brings us to the heart of the issue here: Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes.

***4** The facts here are similar to those in a recent case where we remanded for an evidentiary hearing on the question of ineffective assistance of counsel at the penalty phase. In Caro v. Calderon, 165 F.3d 1223 (9th Cir.1999), we stated that "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." Id. at 1227. There, defense counsel knew that the defendant had been abused as a child and exposed to neurotoxic chemicals throughout his life. However, the lawyer did not seek out neurochemical experts or even provide the examining doctors with the information he had about the

defendant's background. Upon learning the full extent of Caro's background, one examining doctor declared that had he known it earlier, he would have testified that the defendant had diminished mental capacity. See id. at 1226. Although the lawyer's failure to develop and relay medical evidence did not constitute ineffective assistance at the guilt phase, we concluded that sentencing-where mitigation evidence may well be the key to avoiding the death penalty-is different. See id. at 1227. We explained that,

> [c]ounsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert.... A lawyer who knows of but does not inform his expert witnesses about ... essential pieces of information going to the heart of the case for mitigation does not function as 'counsel' under the Sixth Amendment.

Id. at 1226, 1228.

Wallace's situation also bears some similarity to two recent cases where we affirmed findings of ineffective counsel at the penalty phase. At the sentencing hearing in Clabourne v. Lewis, 64 F.3d 1373 (9th Cir.1995), Clabourne's lawyer relied on the trial testimony of one psychologist, and

inadequately cross-examined the State's psychologists. See id. at 1384. However, he had barely prepared his own psychologist for his trial testimony, and had provided him with scant information about the defendant and his background. See id. Nor had the lawyer provided the State's psychologist with statements and records that would have helped them profile the defendant's mental health accurately. See id. at 1385. Clabourne's lawyer was also Lamar Couser. See id. at 1376.

In Hendricks v. Calderon, 70 F.3d 1032 (9th Cir.1995), we concluded that the defense lawyer had reasonably relied on psychologists' findings in not pursuing a mental defense at trial. See id. at 1037-39. Even though the psychologists lacked important information about Hendricks's drug problems and hard childhood, we held that counsel's failure to investigate and relay this information was not deficient because the psychologists had not asked for it. See id. at 1038. At the penalty phase, however, this same lack of diligence did constitute ineffective assistance. [FN5] Recognizing that "[e]vidence of mental problems may be offered to show mitigating factors in the penalty phase, even though it is insufficient to establish a legal defense ... in the guilt phase," we said that "where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing,

without a supporting strategic reason, constitutes deficient performance." Id. at 1043.

*5 To descend to the level of ineffective assistance of counsel, a lawyer's performance must be poor indeed. Yet, Caro, Hendricks and Clabourne establish that, at the penalty phase of a capital case, a failure to investigate or to adequately prepare expert witnesses may sink to that level. Based on the affidavits he presented, Wallace has made out a prima facie case that Couser and possibly Curtis were less than competent at sentencing. [FN6] It's true that the experts who examined Wallace didn't ask Couser or Curtis to investigate his background further. [FN7] However, Hendricks holds that this does not relieve the attorneys of their duty to seek out such evidence and bring it to the attention of the experts.

Because there was no hearing, the State did not have an opportunity to cross-examine Wallace's affiants, or to present evidence of its own. Nor, of course, did the district court make any findings. However, were the district court to accept all of Wallace's evidence, it could find that Wallace's lawyers were ineffective, and conclude that "there is a reasonable probability that the death sentence would not have been imposed" had they been effective. Hendricks, 70 F.3d at 1044. We therefore remand for an

evidentiary hearing and findings as to whether Couser and Curtis were ineffective and, if so, whether Wallace was prejudiced as a consequence.

C. Wallace also argues counsel were ineffective at the guilt phase, a much tougher sell given Caro and Hendricks. Wallace hasn't presented or even suggested enough evidence to show that he lacked the mental capacity to stand trial, or that he could have raised a credible insanity defense. Although Dr. Hinton now says he would have recommended a full competency hearing had he known more about Wallace's background, he didn't request more information at the time of the examination. Under Hendricks, Couser's failure to produce the information doesn't constitute ineffective assistance.

Other Claims

Wallace argues the trial court erred by not ordering a pre-trial competency hearing. The court was entitled to rely on Dr. Hinton's original recommendation that Wallace was fit to stand trial. Further, the evidence before the trial court here resembles the evidence before the court in de Kaplany v. Enomoto, 540 F.2d 975 (9th Cir.1976) (en banc), where we held it was not error to fail to hold a competency hearing.

Wallace raises a number of other claims related to his sentence. Most are specious, but several do pose somewhat difficult questions. Should the

ultimate result on the ineffective assistance claim be that the State must hold a new sentencing proceeding, it would be unnecessary to decide any of these other claims. We therefore do not reach them at this point. Should Wallace ultimately fail as to his ineffective assistance claim, we shall reinstate these claims and decide them then.

***6** We REVERSE the district court's judgment as to ineffective assistance of counsel at the sentencing phase and REMAND for an evidentiary hearing on that claim. We AFFIRM on the remaining portion of the ineffective assistance claim and on the competency hearing claim.

FN1. Wallace argues that the Arizona Supreme Court should also have remanded or reweighed his sentence for the children's murders before affirming. However, the court did not invalidate the aggravating factor attached to the children's murders, a prerequisite for remanding or reweighing. See Clemons v. Mississippi, 494 U.S. 738, 741, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Here, though the Arizona Supreme Court found that the murders were not cruel, it did not find them heinous and depraved. Cf. State v. Miles, 186 Ariz. 10, 918 P.2d 1028, 1037 (Ariz.1996) (cruelty without heinousness can be an aggravating factor, as can heinousness without cruelty). Although Arizona passed a law in

1994 requiring the state supreme court to reweigh the aggravating and mitigating circumstances in all death cases where it determines that an error was made with respect to a finding of aggravation or mitigation, see Ariz.Rev.Stat. § 13-703.01(B)(1994), this procedure was certainly not required-under state or federal law-when Wallace's case was before the Arizona Supreme Court in 1986.

FN2. As a practical matter, it was also highly unlikely the sentencing judge would have changed his mind about imposing the death penalty for Susan's murder. Having imposed the death penalty as to the children on the ground that the murders were heinous and depraved, it is doubtful he would have found the murder of the mother was not equally heinous and depraved.

FN3. Upon hearing this testimony, Wallace exclaimed, "My mother's alive. I don't know who the hell you're talking about. You sure as hell aren't talking about me." Gurland thought this reaction confirmed his original diagnosis, and testified that this outburst demonstrated that Wallace was unable to control his anger.

FN4. Citing Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), the district court held that it couldn't consider certain affidavits and documents Wallace

presented-including affidavits from the doctors who examined Wallace prior to and after his sentencing hearing, and affidavits by Wallace's sisters-because they had not been offered in state court. However, Keeney does not bar Wallace from presenting, or us from considering, this additional evidence. Keeney held that a habeas petitioner is not entitled to a federal evidentiary hearing unless he shows cause and prejudice for failing to adequately develop the factual record at an earlier state evidentiary hearing. See id. at 11. In his first state post-conviction proceeding, which Curtis filed hurriedly to obtain a stay of execution, Wallace made no claim regarding ineffective assistance of counsel at the plea and sentencing phases. Therefore, we will not penalize him for failing to develop the record on that question.

In a second state post-conviction proceeding, Wallace did make the same ineffective assistance claim that he raises here. Although the State argued that Wallace had defaulted the ineffective assistance claim by not raising it in his first petition, the state court rejected the claim on the merits. This denial by the state court satisfies the Keeney cause and prejudice standard. Wallace, an indigent, had moved for the appointment of an investigator, an evidentiary

hearing and funds for mental health experts. The state court, despite having before it the compelling affidavits of Drs. Bendheim and Gurland, denied the motions. Under Correll v. Stewart, 137 F.3d 1404 (9th Cir.1998), Wallace fulfilled the cause prong of Keeney because he properly presented a colorable claim, and the state court denied him an evidentiary hearing. See id. at 1413. Wallace also satisfied the prejudice prong because there is a reasonable probability that the state courts would have granted him relief, had he been allowed to develop the evidence. We may therefore consider the affidavits in support of Wallace's ineffective assistance claim, and the district court may consider them on remand.

FN5. Hendricks alludes to why the lawyer's burden might differ at the guilt phase from that at the penalty phase: Mental state is relevant at the guilt phase for issues such as competence to stand trial and legal insanity-technical questions where a defendant must show a specific and very substantial level of mental impairment. Most defendants won't have problems this severe, and counsel can't be expected to know that further investigation is necessary to develop these issues. By contrast, all potentially mitigating

evidence is relevant at the sentencing phase of a death case, so a troubled childhood and mental problems may help even if they don't rise to a specific, technically-defined level.

FN6. But see pp. 8230 & n. 2 supra (noting that Curtis had little incentive to be forceful in his presentation).

FN7. The failure of a psychologist retained on Wallace's behalf to make a proper inquiry as to Wallace's background may also constitute a failure to provide competent psychiatric advice in violation of Ake v. Oklahoma, 470 U.S. 68,105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Despite exhausting this claim in state court, Wallace has not raised it here.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JAMES GRANVIL WALLACE, Petitioner, vs. TERRY STEWART, et al.,[1] Respondents.	No. CIV 91-315-TUC-WDB **MEMORANDUM OF DECISION AND ORDER**

Petitioner James Granvil Wallace ("Petitioner") filed a Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death B-1in violation of the United States Constitution. The Petition raises eighteen claims. For the reasons set forth herein, the Court finds that Petitioner is not entitled to federal habeas corpus relief.[2]

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[1] Terry Stewart, Director of the Arizona Department of Corrections, and Meg Savage, Warden of the Arizona State Prison, Florence Complex, are substituted pursuant to F.R.C.P. 25(d)(1).

[2] The Court has not applied the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (to be codified at 28 U.S.C. § 2261), to this case in light of the Ninth Circuit's decision in Jeffries v. Wood, No. 95-99003, 1996 WL 730493 (9th Cir. Dec. 20, 1996).

FACTUAL BACKGROUND

For two and one-half years Petitioner shared a mobile home with his girlfriend, Susan Insalaco, and her two children, Anna and Gabe, ages sixteen and twelve. After an argument about Petitioner's continued use of alcohol and drugs, Susan asked Petitioner to move out immediately. The next day, February 1, 1984, Petitioner remained at the mobile home drinking and waiting for Susan and her children to return from work and school. When Anna entered the mobile home at approximately 2:45 p.m., Petitioner struck her numerous times in the head with a baseball bat, eventually breaking the bat. Because she was moaning and still alive, Petitioner forced the end of the broken bat through her neck until it contacted the floor. He dragged her body into her mother's bathroom and locked the door.

Petitioner then obtained a pipe wrench from an outside storeroom, returned to the living room and waited for Gabe. When Gabe returned from school at about 3:00 p.m., Petitioner followed him into his bedroom and repeatedly struck him over the head with the pipe wrench. The force of the blows fractured Gabe's skull in several places and left brain matter visible on the floor.

Next, Petitioner loaded a handgun and waited for Susan to return from work at 5:00 p.m. However, he decided that the gun would make too much noise and might alert the neighbors. When Susan arrived, she had a brief discussion with Petitioner and went into the kitchen to put away groceries. Petitioner struck her in the head with the pipe wrench. He repeatedly struck her even after she had fallen to the floor. Petitioner then took Susan's truck and money from her wallet and drove to a liquor store. He drank at a roadside area and then went to a friend's house where he played chess and spent the night.

The next day, February 2, 1984, Petitioner confessed to his friend and called the police to report that he had killed three people. After the police went to the mobile home and verified the report, Petitioner was arrested and advised of his legal rights. Petitioner gave the police several detailed confessions in which he repeatedly expressed remorse for his actions.

PROCEDURAL BACKGROUND

Petitioner pled guilty to three counts of first-degree murder. On May 15, 1985, the superior court sentenced Petitioner to death on each count. For Anna and Gabe's murders, the court found the aggravating circumstance of cruel, heinous and depraved. The court found one

mitigating circumstance (remorse), but found that it was not sufficiently substantial to call for leniency. As to Susan's murder, the court found the aggravating circumstance of pecuniary gain, in addition to cruel, heinous and depraved, and the one mitigating circumstance.

On direct appeal, the Arizona Supreme Court held there was insufficient evidence to support the finding that the murders were cruel. The court affirmed the sentences for Anna and Gabe's murders. Regarding Susan's murder, the court remanded for resentencing because it set aside the finding of the pecuniary gain aggravating circumstance. State v. Wallace, 151 Ariz. 362, 728 P.2d 232 (1986) [hereinafter Wallace (I)].

On remand, the superior court conducted a new aggravation/ mitigation hearing for the resentencing for Susan's murder. The court again sentenced Petitioner to death after weighing the one mitigating circumstance of remorse against the aggravating circumstance of heinous and depraved. Before he was resentenced, Petitioner had filed a petition for post-conviction relief on June 23, 1987. The superior court denied the petition. The Arizona Supreme Court affirmed the death sentence for Susan's murder and held that the superior court did not err in denying the petition for post-conviction relief. State v. Wallace, 160 Ariz. 424, 773 P.2d 983 (1989) [hereinafter Wallace (II)].

On November 20, 1990, Petitioner filed a second petition for post-conviction relief and amended the petition on July 22, 1991. The superior court denied the petition on November 26, 1991. The Arizona Supreme Court denied review and the United States Supreme Court denied certiorari.

On June 5, 1991, Petitioner filed a Preliminary Petition for Writ of Habeas Corpus in this Court. The Court stayed the proceedings pending the exhaustion of Petitioner's claims in state court. The stay was lifted on February 12, 1993. Petitioner filed an Amended Petition on July 2, 1993, and a Second Amended Petition ("Petition") on November 15, 1994. Respondents filed an Answer and Petitioner filed a Traverse.

CLAIMS DECIDED ON THE MERITS

Claim 1: Petitioner Was Denied the Effective Assistance of Counsel.

Petitioner claims that his trial counsel provided ineffective assistance in the pre-trial investigation, pre-trial proceedings, sentencing, and resentencing. (File doc. 65 at 5-10, 27-42.)[3] To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052,

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[3] "File doc." refers to documents in this Court's file. "R.O.A." refers to the state court record on appeal. "M.E." refers to minute entries of the state court. "Pl. Ex." refers to Plaintiff's exhibits in the state court record. "R.T." refers to the reporters' transcripts.

2064 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. Id. at 688-89, 104 S. Ct. at 2065. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. Regarding prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different " Id. at 694, 104 S. Ct. at 2068. When a petitioner challenges a death sentence, the question is whether there is a reasonable probability that, absent the alleged errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Id. at 695, 104 S. Ct. at 2069.

For the reasons discussed below, the Court finds that Petitioner did not receive ineffective assistance of counsel.

The Record in This Case

Hector Estrada of the Pima County Public Defender's Office was assigned to represent Petitioner. Estrada had an investigator begin an investigation into Petitioner's background and the possibility of an insanity defense. (R.T. 5/10/85 at 16-20.) After about three months, when Estrada

left the Public Defender's Office, Barry Baker-Sipe was assigned to Petitioner's case. Baker-Sipe arranged for Petitioner to be examined by Dr. David Gurland, a psychiatrist, on May 30, 1984. (R.O.A. Vol.1 at 84-85; R.T. 5/14/84 at 5-6.) Dr. Gurland attempted to hypnotize Petitioner in order to ascertain a possible underlying etiology for the murders, but was not successful. (R.O.A. Vol.2 at 58.) Baker-Sipe also filed a motion to suppress the statements Petitioner had made to the police and filed a motion to extend the time for a change of plea, noting that "plea negotiations are ongoing." (R.O.A. Vol.1 at 91, 97.) On October 15, 1984, Baker-Sipe filed a motion to withdraw as counsel stating that Petitioner "has refused to permit present counsel to investigate his case" and "threatened to obstruct counsel's ethical obligations to present a defense at the upcoming trial." (R.O.A. Vol.1 at 119-20.)

Subsequently, Lamar Couser was appointed as Petitioner's counsel. Because Petitioner was insisting on changing his plea to guilty, Couser filed a motion for a Rule 11 mental examination in order to determine whether he was competent to enter a plea, stand trial, and assist in his defense. The superior court ordered that Petitioner be evaluated by the Pima County Court Clinic for the purpose of assisting the court to determine whether formal Rule 11 proceedings should take place. (R.O.A. Vol.1 at 125-27.)

On January 15, 1985, Dr. Richard Hinton, a clinical psychologist, examined Petitioner. Dr. Hinton's report stated that he had available police reports, other documents regarding the crimes, and the results of a psychological test, the Minnesota Multiphasic Personality Inventory (MMPI). Dr. Hinton stated that Petitioner "had no difficulty completing the standard battery of psychological tests." The doctor noted that from an early age Petitioner had used a variety of drugs including hallucinogens, barbiturates, amphetamines, marijuana and alcohol, and that on some occasions he experienced black-outs. The evaluation revealed "no indication of a major mental disorder." Dr. Hinton further stated: "Extensive inquiry into this man's behavior prior to and during the time of the offense revealed no indication of delusions, psychotic thinking, depersonalization, dissociation or other mental illness or defect which could have compromised his mental state at the time of the offenses. It is likely that the alcohol and drugs which he ingested prior to the offenses compromised his impulse control and interfered with his judgment to some extent however." Dr. Hinton concluded that Petitioner was competent to enter a plea, stand trial, and assist his attorney, and that there were not sufficient grounds to pursue formal Rule 11 proceedings. (Reports dated 1/16/85 and 2/5/85.) The court found no need to proceed with formal Rule 11 proceedings based on Dr.

Hinton's report and its "own observations of Mr. Wallace." (R.O.A. Vol.1 at 129.) Dr. Hinton's report was sent to and reviewed by Couser prior to the change-of-plea hearing. (R.T. 2/22/85 at 2-3.)

Prior to the change-of-plea hearing, Couser filed a memorandum to the court which stated that the proposed plea change "will transpire against the advice and instincts of defense counsel." Nevertheless Couser was proceeding because "the defendant has insisted since the outset . . . that he does not wish to be defended" and because Dr. Hinton concluded that he was competent to enter into a guilty plea. Couser requested "an extensive" mitigation hearing and moved for an order authorizing him to hire a psychiatric expert to assist the defense. He also notified the court that "if [any]thing is discovered prior to sentencing that would indicate a bona fide defense of insanity, then in that event, a motion will be filed to withdraw from all guilty pleas." (R.O.A. Vol.1 at 135-40.) The court granted Couser's request to hire a psychiatrist. (Id. at 134.)

The change-of-plea hearing took place on March 1, 1985. The court made a finding that Petitioner was mentally competent to enter a change of plea. The court discussed with Petitioner the rights he would be giving up, the charges, and the possible sentences. Petitioner insisted that he wanted to plead guilty even though the state would be requesting the

death penalty. (R.T. 3/1/85 at 3-9, 18-22.) The court asked Petitioner about the murders:

> THE COURT: Well, how did you accomplish that? What means did you use?
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> THE DEFENDANT: I killed Anna with a bat. I killed Gabriel with a pipe wrench and I killed his mother with a pipe wrench.
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> THE COURT: I realize this is painful for you. It's not my purpose to do that. I have to go through this exercise in order to see if I can take a plea in the case. When you did those things did you intend to do them?
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> THE DEFENDANT: I knew they were going to die.
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> THE COURT: Was it your purpose that they die at the time?
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> THE DEFENDANT: I guess it was.
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> THE COURT: Had you thought about it before you did it?
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> THE DEFENDANT: When Anna was coming in the door I was yelling to myself to get out of there, to run away. I didn't. I don't remember thinking about it before or nothing. I don't know what I was doing before.
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> . . . .
>
> THE COURT: What can you remember of your thought process just before you killed Anna?
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> THE DEFENDANT: Just telling myself to get the hell out of there. I just knew some way somehow they were going to die that day. I don't know why.
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> . . . .
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> THE COURT: Had you consumed any alcohol of any sort?
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> THE DEFENDANT: Drank a couple beers. Smoked a couple joints, but I do that all the time.
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> THE COURT: Were you intoxicated?
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> THE DEFENDANT: No, sir.

(Id. at 10-14.) The court also took a recess to read Petitioner's confessions. (Id. at 17-19; see also Petitioner's statements to the police, Pl. Ex. 3-6: "I knew I was going to kill them." "I planned out how I was going to do it.") The court then accepted the guilty pleas. (Id. at 22-23.) Couser made the following statement for the record:

> It's quite clear that this proceeding has transpired against by advice. Some future enquiry might raise the question of why defense counsel permitted this to go ahead, why didn't defense counsel withdraw. My client has had predecessor counsel and they have been gotten rid of and I was appointed. He wouldn't cooperate with them and nor with me in the sense of wanting to defend himself. I could've moved to withdraw for that purpose, but I think the buck has to stop somewhere. I owe a duty to him to defend him to the best of my ability, but we all owe a duty to the court system to bring things to a head. That's why I hung in here, but I want the Court to know if anything happens between now and the time of sentencing that would indicate a bona fide insanity defense I fully intend to move to withdraw [the plea].

(Id. at 25-26.)

Prior to the presentence hearing, the Pima County Adult Probation Department, which was to prepare a presentence report, asked the Court Clinic to examine Petitioner in order to determine a probable cause or motive for the offense. On March 20, 1985, Petitioner was examined by Dr. Barry Morenz and Dr. James Little, psychiatrists. Their report states that the following methods of assessment were used: Biographical Data

Sheet, Minnesota Multiphasic Personality Inventory (MMPI), Rotter Incomplete Sentences Blank, and Clinical Diagnostic Interview. The report recited Petitioner's life history, including: Petitioner's father was an alcoholic and rarely home; his mother was hospitalized at least three or four times for mental illness and at least once received electric shock therapy; his parents frequently fought and his mother frequently tried to get his father fired from jobs; he did not receive much supervision; at age thirteen he began smoking marijuana and committing burglaries and theft; he was expelled several times from school and often got into fights; he joined the Marines and deserted several times; his subsequent marriage was a stormy relationship. The doctors noted that Petitioner has a "very extensive history of polysubstance abuse" with use of alcohol (sometimes accompanied by black-outs), LSD, heroin, amphetamines and barbiturates. Petitioner related that in the past he had had dreams and daydreams in which violence occurred to his sister, his daughter, and Susan. He told the doctors that approximately two months before the murders, he had moved out of his girlfriend's house but still continued to see her fairly often. On the evening before the murders he had returned to her house. He was intoxicated and they had an argument about his drinking. The next day, he drank two beers, drank two shots of liquor, and smoked two or three joints of

marijuana. Petitioner also told the doctors that before the children returned home he "knew" that they would die, but did not admit that he "planned" the murders. He remembered committing the murders, but could not state how he was feeling at the time. He specifically denied feeling anger. Dr. Morenz and Dr. Little's diagnosis was anti-social personality disorder and polysubstance abuse.[4] Their report stated:

> This client is a product of a very chaotic childhood in which his father was rarely around and his mother appeared to have suffered from a mental illness of psychotic proportions. Few limits and external controls were set on the client as a youth and his aggression was never held in bounds by his parents. This client is very impulsive and has a long history of violent episodes. He also has a long history of being vengeful and retaliating quickly when threatened.
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> The visions that the client states he had of violence being perpetrated against his sister, daughter and girlfriend are probably projections of his own violent fantasies.
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> Certainly this client has a history of chronic polysubstance abuse and undoubtedly, at the time of the instant offense, there was some degree of intoxication. As to why the instant offense occurred when it did, it is difficult to say with certainty . . ..

(See exhibits to Presentence Report filed 5/15/85.) The doctors' report was appended to the presentence report.

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[4] Under Arizona law, a person cannot be tried for an offense while, "as a result of a mental illness or defect," the person is unable to understand the proceedings or to assist in his own defense. Ariz. R. Crim. Proc. 11. A person can be found legally insane at the time of the offense if he had a "mental disease or defect." A.R.S. § 13-502. "Mental disease or defect" does not include personality disorders or character defects. Id. See also State v. Salazar, 146 Ariz. 540, 542, 707 P.2d 944, 946 (1985).

The presentence report itself added the following details about Petitioner's history: his mother had a habit of disappearing without warning for weeks at a time and once the family discovered that she had been hiding in the attic for days; also, his mother had hit his father with a frying pan and thrown scalding water on his father. A letter from Petitioner's mother was attached, stating that he was a very warm, loving child growing up and that he has a thirteen-year-old daughter who adores him. There was a letter from Petitioner admitting his guilt and strongly expressing remorse and sympathy for the victims' family. There was also a letter from one of Petitioner's sisters stating that Petitioner has always been great with children and that her children love their uncle. (See Presentence Report filed 5/15/85.)

The presentence (aggravation/mitigation) hearing was held on May 10, 1985. Couser presented six friends and co-workers who testified that Petitioner was a heavy drinker, used marijuana frequently, and sometimes took LSD and acid. They also testified that Petitioner was honest, considerate, generous, never violent, and loved Susan and her children. (R.T. 5/10/85 at 3-9, 66-72, 90-104, 115-26.) One friend testified that Petitioner took some kind of drug, possibly LSD, the day before the murders. (Id. at 72.) Couser also called Petitioner's two prior attorneys to

testify on his behalf. Through their testimony, Couser brought out evidence that Petitioner was profoundly and genuinely remorseful and that from the start he admitted guilt and accepted responsibility for his acts. (R.T. 5/10/85 at 9-26, 104-10.)

Couser had also retained Dr. Otto Bendheim, a psychiatrist, to examine Petitioner and testify on his behalf at the presentence hearing. On April 11, 1985, Dr. Bendheim conducted a preliminary interview of Petitioner, a physical examination, and then interviewed him while he was under the effects of sodium amytol (i.e. "truth serum"). He questioned Petitioner about his background, past experiences, and the murders. He also reviewed the presentence report. At the presentence hearing, Dr. Bendheim testified that Petitioner "had a very severely disturbed childhood" with an alcoholic father and a mentally ill mother. He noted that the mother physically abused the father and was a "difficult psychotic woman." He also noted that Petitioner began abusing alcohol and drugs when a young teenager and had behavior problems at home, at school, and later in the military and in his marriage. The doctor stated that Petitioner's prolonged past use of alcohol and various hallucinogenic drugs could cause present "flashbacks," which are hallucinatory experiences occurring even when no drugs have been ingested recently. Petitioner told the doctor that he

recalled committing the murders. He said that the day before, he and Susan argued about his drinking and she wanted to end the relationship. He also knew she had another boyfriend. (However, Dr. Bendheim noted that Petitioner showed no resentment or bitterness over this.) Dr. Bendheim testified: "I found no classical type of insanity that I could identify . . .. That does not mean it isn't there, but I couldn't find it." The doctor found no evidence of epilepsy or brain injury. He concluded that Petitioner had not been in a classic disassociative state. He stated that if Petitioner was in some sort of disassociative state, it was "atypical" and not covered by the psychiatric diagnostic manual. Although he suspected "something went wrong" in Petitioner's mind, he found no evidence of any mental illness. Dr. Bendheim could not identify the motivation for the murders, only possible "clues": Petitioner's disturbed relationships with women in the past; bitterness toward women; excessive habitual drug and alcohol abuse; past behavioral problems. (R.T. 5/10/85 at 29-65.)

Prior to the sentencing, Couser argued the following as mitigation: Petitioner's extreme remorse, his admission of guilt, his chaotic upbringing, his love for Susan and her children, his good character, and that Petitioner must have been in an atypical disassociative state caused by long-term drug and alcohol abuse. (R.T. 5/15/85 at 6-9, 16-17.) Couser also had filed a

Sentencing Memorandum which argued, inter alia, that there was evidence that Petitioner was intoxicated at the time of the offense. Attached to the memorandum was a copy of Eddings v. Oklahoma, a letter from Petitioner, and various jail records as evidence of remorse, non-violence, and a seizure-like occurrence. (R.O.A. Vol.1 at 168-97.)

George Curtis was appointed to represent Petitioner on his appeal. Curtis succeeded in having Petitioner's guilty plea to armed robbery vacated, the pecuniary gain aggravating circumstance invalidated, and a resentencing for Susan's murder ordered. The superior court granted Curtis' motion to retain a psychiatrist to assist the defense at the resentencing (aggravation/mitigation) hearing. (R.O.A. Vol.2 at 38, 48.) Curtis retained Dr. Gurland, who prepared a report and testified at the hearing on August 21, 1987. Dr. Gurland had reviewed his 1984 file on Petitioner, the police reports, Petitioner's confessions, and other records. On May 29, 1987, he interviewed Petitioner about his past history and background, the crimes, and his present condition. In his report, Dr. Gurland noted the family history of alcoholism, lack of parental guidance, and Petitioner's long-time abuse of alcohol and drugs. Dr. Gurland believed that the precipitating factor in the murders was Petitioner's break up with Susan: "Since he has great difficulty in expressing his feelings or

even being aware of them, it is my opinion that what happened was that his fears, anxieties and anger of abandonment, which is something that happened to him in his earlier years, came to the forefront and so overwhelmed him that he reacted to the situation at hand by taking out his anger on the three victims." It was also Dr. Gurland's opinion that when committing the murders, Petitioner was in an "atypical disassociative state" in which he knew he was committing the acts but could not stop himself. He concluded that Petitioner had significantly diminished capacity to control his actions and was acting under an "irresistible impulse." (R.O.A. Vol.2 at 58-60; see also R.T. 8/21/87 at 10-49.)

At the same hearing, the state called Dr. Hinton and Dr. Morenz for rebuttal. Dr. Hinton testified that when he evaluated Petitioner in 1985 he specifically considered and ruled out disassociation and depersonalization. The doctor also stated that at the time of the offense Petitioner's ability to control his conduct was not significantly impaired by substance abuse. Before testifying, Dr. Hinton reviewed the Court Clinic's file, the presentence psychiatric evaluation, the presentence report, Dr. Gurland's report, and Dr. Bendheim's earlier testimony (all of which came into existence after Dr. Hinton conducted the evaluation in 1985). Dr. Hinton did not recant his original opinions. (R.T. 8/21/87 at 51-63.) Dr. Morenz

testified that in 1985 he considered disassociation and depersonalization but found nothing involving a distortion of reality on Petitioner's part. In 1985 he diagnosed anti-social personality disorder and polysubstance abuse, but also found that Petitioner's ability to control his conduct and appreciate its wrongfulness was not significantly impaired. The doctor noted that the origin of anti-social personality disorder is not completely known, but an "abusive, chaotic early childhood" and genetics have been suggested as causes. Dr. Morenz did not recant his original opinions. (Id. at 64-75.)

Petitioner's Ineffective Assistance Claims

Petitioner asserts that trial counsel failed to adequately investigate his competency to stand trial and plead guilty, his state of mind at the time of the offense, his history of substance abuse, and his dysfunctional childhood. He also asserts that, as a result, counsel failed to present at sentencing evidence that Petitioner had mental disorders and a chemical dependency which affected his state of mind. Petitioner contends that a proper investigation and presentation would have created a bona fide doubt about his competency, would have shown that his ability to control his conduct was significantly impaired, and would have revealed that Petitioner was under the influence of alcohol and drugs and had a history of chemical

dependency and physical, mental, and emotional abuse. (File doc. 65 at 5-9, 30.)

In support of his claim, Petitioner submits the affidavits of Dr. James Missett (psychiatrist), Dr. David Lisak (psychologist), Dr. Marc Walter (psychologist), Dr. Morenz, Dr. Hinton, Grace Joyce (sister), Rose Swanson (sister), Hector Estrada, Barry Baker-Sipe, and medical records of Petitioner's mother, Mrs. Wallace. (File doc. 65, Ex. 3, 4, 6-8, 12-17.) Respondents argue that because these exhibits were not presented in state court, this Court cannot consider them absent a showing of cause and prejudice pursuant to Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715 (1992). (File doc. 66 at 17, 20-23, 25-26.) Petitioner contends that Keeney does not apply because the state court refused Petitioner's request for discovery, an investigator, experts, and an evidentiary hearing. (File doc. 69 at 7-9.) The state court did deny these things to Petitioner when he filed his second petition for post-conviction relief in 1991.[5] However, Petitioner was granted an expert and a hearing for his first petition in 1987. Petitioner's resentencing hearing (for Susan's murder) and post-conviction relief hearing (for all three murders) were consolidated. (R.O.A. Vol.2 at

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[5] In ruling on the second petition for post-conviction relief and related motions for psychiatric experts the court held: "The Court is of the opinion that the matters raised are essentially a speculative construct by defendant's attorney . . .." (R.O.A. Vol. 3 at 342.)

70-71, 183-85, 195-97; R.T. 8/25/87 at 23-31.) Petitioner asked for the appointment of Dr. Gurland for the resentencing and subsequently filed a petition for post-conviction relief based on the doctor's opinion that Petitioner had been in a disassociative state at the time of the murders. (R.O.A. Vol.2 at 52.) Petitioner did not request the appointment of additional experts or an investigator.[6] Dr. Gurland testified at the hearing and the state court considered his testimony in ruling upon the petition.[7] Therefore, the Court holds that Keeney does apply. Petitioner has not shown cause and prejudice to excuse his failure to present the above-mentioned affidavits and documents to the state court. The Court will not consider Petitioner's Exhibits 3, 4, 6-8, and 12-17 in these proceedings.

In support of his claim Petitioner also submits the affidavits of Dr. Bendheim, Dr. Gurland, Nancy Strand (sister), and George Curtis, and two attorney's fees requests. (File doc. 65, Ex. 1, 2, 5 9-11.) These exhibits were presented to the state court during the second post-conviction relief proceedings and will be considered by this Court.

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[6] The Court is not expressing an opinion as to whether Petitioner's counsel was ineffective in this regard. Petitioner has no Sixth Amendment right to counsel in his state collateral proceedings. Bonin v. Vasquez, 999 F.2d 425, 429-30 (9th Cir. 1993).

[7] Upon denying the first petition for post-conviction relief, the superior court stated that Dr. Gurland's report "would not change any of the three sentences." (R.O.A. Vol.2 at 196; R.T. 8/25/87 at 28.)

The Court finds that trial counsel's performance was not deficient in investigating Petitioner's competency, state of mind, history of substance abuse, and dysfunctional childhood. The Court also finds no deficient performance in counsel's handling of the change-of-plea hearing and presentence hearing. As discussed above, early in the case Baker-Sipe hired Dr. Gurland in an attempt to substantiate an insanity defense. Subsequently, Couser filed a Rule 11 motion and as a result, Petitioner was evaluated by Dr. Hinton. Dr. Hinton concluded that Petitioner was competent to enter a plea and stand trial and that he was not suffering from a mental disorder at the time of the murders. Prior to the presentence hearing, Petitioner was examined by Drs. Morenz and Little, who found no mental disorder. Upon Couser's motion, Dr. Bendheim was appointed to assist the defense. Dr. Bendheim found no mental disorder. If he had, Couser would have moved to withdraw the guilty plea. At the presentence hearing, Dr. Bendheim discussed the fact that Petitioner had an alcoholic father and a psychotic, abusive mother and noted that his childhood was "very severely disturbed." Dr. Bendheim also discussed Petitioner's abuse of drugs and alcohol. Information concerning Petitioner's dysfunctional childhood and substance abuse was also discussed by the other doctors in their reports and set forth

in the presentence report.[8] In addition, Couser argued in the sentencing memorandum that there was evidence that Petitioner was intoxicated at the time of the murders.[9] Furthermore, Petitioner refused to cooperate with his counsel in presenting a defense. Under these circumstances, the Court finds no deficient performance. The Court also finds no prejudice.[10]

Petitioner also claims that trial counsel was ineffective for failing to investigate and challenge Petitioner's ability to understand and validly waive his constitutional rights when he made statements to the police. Petitioner argues that a proper investigation would have established that he did not

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[8] Petitioner had no history of being diagnosed or treated for mental illness.

[9] However, that evidence was rebutted by Kevin Berger's statement to the police. After the murders, Petitioner drank more alcohol and then went to Berger's house. Berger said that Petitioner had been drinking but was not intoxicated, was coherent, and played several games of chess very well. (See Statement of Kevin Berger, Pl. Ex. 10.) In addition, Petitioner had a detailed recollection of the murders. Petitioner alleges that "[t]he state's own medical reports corroborate that Mr. Wallace was intoxicated at the time of the crime." (File doc. 65 at 33, n.7.) However, Petitioner gives no cite to the record to substantiate this allegation.

[10] In his 1991 affidavit submitted with the second petition for post-conviction relief, Dr. Bendheim states that he did not have the MMPI examination results when he evaluated Petitioner in 1985. However, he states merely that they "could have" substantially impacted his diagnosis, and does not change his diagnosis in the affidavit. (File doc. 65, Ex. 2.) Furthermore, Drs. Hinton, Morenz, and Little did review the MMPI results but did not diagnose Petitioner as having a mental disorder. Dr. Bendheim also states that in 1985 he did not have "the kind of information regarding Mr. Wallace's [family] background that was provided to me by Mr. Wallace's present attorneys." The affidavit does not identify what "kind of information" that is. Prior to testifying at the presentence hearing, Dr. Bendheim had reviewed the presentence report which set forth details of Petitioner's dysfunctional family history. (R.T. 5/10/85 at 57.)

The 1992 affidavit of Nancy Strand, Petitioner's twin sister, offers the same type of information as found in the presentence report, although it gives additional examples of their mother's abnormal behavior. (File doc. 65, Ex. 5.)

voluntarily make the statements and that he was not competent to waive his rights due to mental illness and intoxication. (File doc. 65 at 6.) The police questioned Petitioner three separate times on February 2, 1984 (the day after the murders) and once on February 3, 1984. (Pl. Ex. 3-6.) As noted above, Baker-Sipe filed a motion to suppress the statements for trial, but the motion was rendered moot because Petitioner changed his plea to guilty. See Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252 (1948) (holding that petitioner's alleged illegal detention resulting in a confession had no bearing on the validity of his present confinement which was based on a guilty plea). In addition, Couser investigated whether Petitioner might have been insane at the time of the murders and incompetent to enter a guilty plea, but various doctors concluded that Petitioner had no mental disorder and was competent. The transcripts of Petitioner's conversations with the police do not indicate that he was mentally ill or intoxicated when he made the statements. They show that Petitioner made a knowing, voluntary and intelligent waiver of his rights. (See Pl. Ex. 3-6.) Based on the record of the police interviews and the doctors' reports, counsel could reasonably forgo challenging Petitioner's waiver of his rights. Counsel's performance was not deficient. In addition, there is no prejudice.

Next, Petitioner claims that his counsel failed to conduct an investigation into the accuracy and reliability of the contents of the presentence report. (File doc. 65 at 7.) However, Petitioner does not identify what information in the report, if any, is inaccurate or unreliable. Nor can the Court. Therefore, the Court finds no deficient performance and no prejudice.

Petitioner also contends that counsel was ineffective because he failed to object to prejudicial statements by the victims' relatives provided with the presentence report. (File doc. 65 at 9.) The Court need not decide whether this was deficient performance because there is no prejudice. Even if counsel had objected and the statements had been excised from the report, Petitioner still would have been sentenced to death. Furthermore, as noted in the discussion of Claim 2 below, it is presumed that the sentencing court knew and applied the law and did not rely on improper evidence when deciding Petitioner's sentence.

Petitioner alleges that counsel failed to present evidence at sentencing as to whether a death sentence in Petitioner's case would be excessive when compared to sentences imposed for similar crimes and similar offenders. (File doc. 65 at 8.) Petitioner fails to identify the similar cases which he contends counsel should have cited to the sentencing court.

In addition, the Arizona Supreme Court conducted a proportionality review of Petitioner's death sentence for each murder and found that the "imposition of the death penalty in this case is proportional to the sentences imposed in similar cases." Wallace (I), 151 Ariz. at 370, 728 P.2d at 240; Wallace (II), 160 Ariz. at 428, 773 P.2d at 987. Therefore, the Court finds no deficient performance and no prejudice.

Petitioner further argues that Curtis, his counsel for resentencing, was ineffective because he failed to investigate Petitioner's background and he only called one witness, Dr. Gurland. (File doc. 65 at 8-9, 38-39.) The Court finds that Curtis' performance was not deficient. Curtis was able to find a psychiatrist (Dr. Gurland) who testified that Petitioner was in a disassociative state when he committed the murders, had significantly impaired capacity to control his actions, and was acting under an irresistible impulse. Petitioner points out that Dr. Gurland's diagnosis was based in part on a misunderstanding that Petitioner's mother had died when he was young. There is no evidence that this misunderstanding was Curtis' fault. Furthermore, Dr. Gurland's diagnosis was also based upon other facts such as the family history of alcoholism, the lack of parental guidance and

emotional support, and Petitioner's long-time substance abuse.[11] In addition to Dr. Gurland's testimony at the resentencing hearing, the superior court reconsidered the evidence presented in 1985. Curtis argued for mitigation based on Petitioner's disassociative mental disorder, diminished capacity caused by extreme passion and a history of substance abuse, and sincere remorse. (R.T. 8/25/87 at 2-6, 15-17.)[12] In habeas Claims 3, 4 and 5, Petitioner states that at both the sentencing hearing and the resentencing hearing Petitioner presented "significant mitigation evidence," including evidence "that Petitioner had a severely disturbed childhood resulting from an alcoholic father and a severely mentally ill mother." In those claims, Petitioner argues that the mitigation evidence he presented was so substantial that the state court should have found it sufficiently substantial to call for

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[11] Petitioner also notes that Dr. Gurland's "license to practice medicine has since been revoked." Again, this does not show that Curtis' performance was deficient. Furthermore, at the resentencing hearing the state moved to admit evidence that Dr. Gurland's certificate to prescribe certain controlled substances had been cancelled. The court sustained Curtis' objection that the evidence was irrelevant. (R.T. 8/25/87 at 6-8.)

[12] Referring to Curtis' affidavit, Petitioner alleges that "Mr. Curtis candidly admits that the work he did in this case was inadequate and that there was no reasonable or tactical basis for his failure to have investigated this case and to have presented a competent mitigation case." (File doc. 65 at 38.) Curtis makes no such admission in his affidavit. With regard to the issues he raised in the petition for post-conviction relief, Curtis states that he raised only issues based on the record and "conducted no factual investigation concerning the issues relating to Jim's guilt of the offenses charged, potential mitigation, or the appropriateness of the death penalty" because he had to file the petition very quickly to obtain a stay of execution. (Id., Ex. 10.)

leniency. (See file doc. 65 at 11-12, 46-47, 50.) The Court finds no deficient performance and no prejudice.

Habeas relief for Claim 1 is denied.

. . . .

CONCLUSION

Claims 2 (in part), 12, 15, 16 (in part), and 17 are procedurally barred. The rest of Petitioner's claims are denied on the merits. In addition, the Court holds that Petitioner is not entitled to an evidentiary hearing.

Accordingly,

IT IS ORDERED denying with prejudice Petitioner's Petition for Writ of Habeas Corpus and all amendments thereto **[file doc. 1, 27, 65]**;

IT IS FURTHER ORDERED vacating the stay of execution previously entered by the Court **[file doc. 4]**;

IT IS FURTHER ORDERED denying Petitioner's Motion to Strike Notice of Supplemental Authority Regarding Applicability of New Habeas Corpus Statute to Pending Cases **[file doc. 76]**;

IT IS FURTHER ORDERED that the Clerk of the Court send copies of this Order to all counsel of record.

DATED this 24 day of January, 1997.

s/William D. Browning
William D. Browning
United States District Judge

APPENDIX C

*232 728 P.2d 232

151 Ariz. 362

STATE of Arizona, Appellee,
v.
James Granvil **WALLACE**, Appellant.

No. 6584.

Supreme Court of Arizona, In Banc.

Oct. 29, 1986.

. . . .

HAYS, Justice.

Defendant, James Granvil Wallace, pled guilty to three counts of first-degree murder, A.R.S. § 13-1105, and two counts of armed robbery, A.R.S. § 13-1904. The trial judge sentenced defendant to death on each first degree murder count and to concurrent sentences of twenty-one years on each armed robbery count. Defendant appeals from these sentences. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3) and A.R.S. §§ 13-4031, -4035.

On February 2, 1984, defendant telephoned the Tucson Police Department to report that he had killed three people. Defendant told police that he had killed the victims the previous afternoon in a mobile home which

he had shared with them. Defendant also gave police the address of the mobile home as well as the address from which he was calling.

Upon receiving the call, police and members of the Pima County Sheriff's office went to the mobile home and verified the report. Defendant was subsequently arrested and, after being advised of his legal rights, defendant gave police a detained confession. Throughout his confession, defendant expressed remorse for his acts and repeatedly requested execution.

Defendant told police that for the past two and one-half years he had shared the mobile home with his girlfriend, Susan Insalaco, and her two children, Anna and Gabe, ages 16 and 12. Defendant stated that just before the murders, he and Susan had argued over defendant's continued use of alcohol and drugs. Additionally, Susan apparently had become interested in another man. For these reasons, on January 31, 1984, Susan asked defendant to move out of the mobile home immediately.

The next day defendant, who had been drinking, remained at the mobile home waiting for Susan and her children to return. At approximately 2:45 p.m., Anna arrived. As she entered the mobile home, defendant attacked her from behind with a baseball bat. He struck her numerous times about the head, eventually breaking the bat. Because Anna was moaning and still appeared to be alive, defendant forced a portion of the broken bat through

her throat until it hit the floor. He then dragged Anna's body into her mother's bathroom and locked the door.

After obtaining a pipe wrench from an outside storeroom, defendant returned to the living room and waited for Gabe. When Gabe returned from school at approximately 3:00 p.m., defendant followed him into his bedroom. There, defendant surprised Gabe and repeatedly struck him over the head with the pipe wrench. Defendant used such force that the skull was fractured in several places and brain matter was clearly visible on the floor.

Defendant next loaded a handgun and waited for Susan to return from work at 5:00 p.m. By the time she arrived, however, defendant had decided that the gun would make too much noise and might alert the neighbors. When Susan entered the mobile home, she had a brief discussion with defendant and then went to the kitchen to put away groceries. As she turned to face defendant, he struck her on the side of her head with the same wrench he had used on Gabe. Defendant repeatedly struck Susan even after she had collapsed to the floor.

At this point, defendant decided he needed a drink. He took Susan's truck and some money from her wallet and drove to a liquor store. From there defendant drove to a roadside area to drink. After a while, defendant went to a friend's house where he played chess and spent the night. The next

day, defendant told his friend what had happened and then telephoned police.

Defendant was indicted on three counts of murder and two counts of armed robbery, each count containing an allegation of dangerous nature. Defendant notified his lawyers, in writing, that he wanted to be convicted and sentenced to death for these acts. This conduct, in part, prompted one of defendant's lawyers to file a Rule 11 motion. Based on the results of a preliminary examination, however, the trial court found defendant competent to stand trial.

On March 1, 1985, defendant pled guilty to all counts contained in the indictment. Defendant entered this plea against the advice of his lawyers and without benefit of a plea agreement. (FN1) In this appeal, defense counsel raises several issues concerning the basis for the plea and the sentences imposed on defendant by the trial court.

. . . .

HOLOHAN, C.J., GORDON, Jr., V.C.J., and CAMERON, and HELDMAN, JJ., concur.

FN1. We note that throughout these proceedings, including this appeal, defendant has requested no assistance from counsel in defending the changes

against him. Appeal to this court is automatic, however, pursuant to §13-4031.

(2)

No. 99 - 689

Supreme Court, U.S.
FILED
NOV 19 1999

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

TERRY L. STEWART, Director, Arizona Department of Corrections,
Petitioner,

v.

JAMES GRANVIL WALLACE, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, DELAWARE, GEORGIA, KANSAS, MISSOURI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, OREGON, PENNSYLVANIA, TENNESSEE, UTAH, AND WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTION PRESENTED

Did the Ninth Circuit err in holding, contrary to *Strickland, Teague,* and decisions by other circuit courts of appeal, that claims of ineffective assistance of counsel in the guilt and sentencing phases of a capital case are subject to different standards of review and that defense counsel had a duty in a capital sentencing proceeding to investigate and provide facts to the examining mental health experts that those experts did not request?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999
No. 99 - 689

TERRY L. STEWART, Director, Arizona Department of Corrections,
Petitioner,

v.

JAMES GRANVIL WALLACE, *Respondent*.

INTEREST OF AMICI CURIAE

The amici states are responsible for defending presumptively valid death penalty judgments against federal habeas corpus challenges. They have a compelling interest in the finality of such judgments and in ensuring that the limited role of federal courts when reviewing collateral claims be respected. The well-established requirement of restraint on habeas review is particularly important when considering allegations of ineffective assistance of trial counsel. The opinion of the Ninth Circuit Court of Appeals in this case completely ignores the "significant limits on the discretion of federal courts to grant habeas relief" imposed by this Court. *Calderon v. Thompson*, 118 S.Ct. 1489, 1500 (1998). Indeed, the circuit court has imposed broad new mandatory duties on defense counsel, which are both inconsistent with the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and overlook the "rule of contemporary assessment of counsel's conduct" mandated by this Court. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Specifically, the circuit court concluded

in direct contradiction of *Strickland* that claims of ineffective assistance by trial counsel in the sentencing phase of a capital case should be considered under different standards from those applicable to the guilt phase or any noncapital trial. The requirements mandated by the circuit court violate the prohibition against creating new rules on collateral review, *Teague v. Lane*, 489 U.S. 288 (1989), and undermine the finality of innumerable death judgments. Amici urge the Court to grant certiorari in order to review these issues.[1]

REASONS FOR GRANTING THE WRIT

The Sixth Amendment right to counsel in criminal cases "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). "The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding . . . ." *Fretwell*, 506 U.S. at 370. Thus, a state prisoner challenging trial counsel's action must prove both that his attorney's performance was deficient and that counsel's actions were prejudicial. *Strickland*, 466 U.S. at 687. "Judicial scrutiny of counsel's performance must be highly deferential," *id.* at 689, and must ultimately focus on whether the result of the trial was unreliable or the proceeding was fundamentally unfair. *Fretwell*, at 372.

The Ninth Circuit opinion in this case acknowledges none of the restraints imposed by this Court on federal court collateral review of presumptively final state judgments and all but ignores this Court's decisions on ineffective assistance of

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1. Arizona also seeks certiorari on the Ninth Circuit's grant of an evidentiary hearing based on evidence presented by Wallace for the first time in federal court. Amici agree that the opinion below conflicts with other circuits and endorse the arguments presented by Arizona in the Petition For Writ of Certiorari.

counsel. The Ninth Circuit reversed this capital judgment by concluding: (1) that ineffective assistance claims relating to the sentencing phase of a capital case should be judged by different standards from those applicable to guilt phase representation; (2) that trial counsel has a duty to obtain and present to expert witnesses information that might assist their evaluation even if not requested to do so by the expert; and (3) that the discovery of any additional mitigation after trial is sufficient to establish ineffective assistance based on trial counsel's failure to uncover and present it. *Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999). The Ninth Circuit's holdings defy the decisions of this Court and constitute new rules within the meaning of *Teague*.

A. Ineffective Assistance of Counsel Claims Are Governed By The Same Standard In All Phases of a Capital Trial

Prior to this Court's decision in *Strickland*, there was some suggestion that claims of ineffective assistance of counsel in the sentencing phase of a capital case should be judged under more rigorous standards than those applicable to review of noncapital cases or even to the guilt phase of a capital case. *See* Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299 (1983). The Court firmly rejected that suggestion: "A capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision [citations omitted] that counsel's role in the proceedings is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision." 466 U.S. at 686-687.[2] Since *Strickland*

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2. Indeed, the Court left open the question of whether it might apply a different, presumably less rigorous test, to claims of ineffective assistance in "ordinary sentencing" proceedings. 466 U.S. at 686; *see Caspari v. Bohlen*, 510 U.S. 383, 393 (1994).

the few courts to comment have recognized that the "standards for determining whether counsel has been ineffective in a capital sentencing proceeding are identical to the standards for the guilt phase of the trial." *Flamer v. State of Delaware*, 68 F.3d 710, 732 (3d Cir. 1995); *see also Collier v. Turpin*, 177 F.3d 1184, 1198 (11th Cir. 1999) (the two-part test of *Strickland* "applies to claims of ineffective assistance during the sentencing phase as well as the guilt phase of the trial"); *Groseclose v. Bell*, 130 F.3d 1161, 1167 (6th Cir. 1997) (quoting *Strickland* language).

Ignoring this Court's express holding, the Ninth Circuit adopted its own approach to evaluating challenges to counsel's representation during capital sentencing proceedings. It held that while trial counsel was not obligated to investigate and bring to the attention of mental health experts information about the defendant's background unless requested to do so by an expert during guilt phase preparation, such a duty did apply at the sentencing phase of a capital case. *Wallace v. Stewart*, 184 F.3d at 1116. In short, the Ninth Circuit held that trial counsel's duty of investigation in the guilt phase is different from the duty to investigate in the penalty phase of a capital case. The sole authority cited to support such disparate requirements was two prior opinions of the Ninth Circuit. *See*, *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995); *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied* 119 S.Ct. 2414 (1999).[3] Because the "relevant precedent" from this Court, *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997), did not compel the rule adopted by the Ninth Circuit—indeed, such

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3. Although *Caro* did, improperly, draw a distinction between the duties of trial counsel in the guilt and penalty phases of a capital trial, *Hendricks* cannot reasonably be read to support such a rule. Amici recognize that a circuit court's misapplication of its own precedent does not justify review by this Court. We make this point simply to demonstrate the utter lack of support for the Ninth Circuit's rule.

precedent affirmatively precluded the circuit court's conclusion—the rule stated violates the retroactivity principle of *Teague*. *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997).

Aside from its failure to follow *Strickland*, the Ninth Circuit's holding assumes that trial counsel's preparation for the guilt and sentencing phases of a capital case can be neatly separated. It cannot. "A lawyer's time and effort in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase." *Tarver v. Hopper*, 169 F.3d 710, 715 (11th Cir. 1999). Thus, counsel's pretrial investigation and preparation has to be considered as a whole. The information obtained with respect to one aspect of the case will necessarily influence counsel's "reasonable professional judgment" on how to proceed with other portions. *See Burger v. Kemp*, 483 U.S. 776, 794 (1987) (counsel reasonably concluded on basis of initial interviews not to undertake additional investigation into defendant's past for possible mitigation evidence). The Ninth Circuit's opinion ignores these principles.

B. Trial Counsel Is Not Obligated To Investigate For Or Present Information To An Expert Witness Unless Requested To Do So By The Expert

The Ninth Circuit held that at the penalty phase of a capital case defense counsel has "a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request[.]" *Wallace*, 184 F.3d at 1116. The court relied entirely upon its own precedent to reach this conclusion. *See Caro*, 165 F.3d at 1226-1228.[4] As explained in the Petition for Writ of

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4. The circuit court has since relied in part upon *Caro* to reverse another Arizona capital case because trial counsel did not independently provide information to experts. *See Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999).

Certiorari, Pet. at 10-11, the Ninth Circuit was forced to rely on its own precedent because there is no support for the court's conclusion in any decision of this Court or the other circuits. At least one court reached precisely the opposite conclusion. *Hill v. Moore*, 175 F.3d 915, 926 (11th Cir. 1999) ("we cannot conclude that counsel were deficient for failing to provide their expert witness with information that, if it existed, the witness was in a position to discover"); *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990) (trial counsel was not obligated to "track down every record that might possibly relate to Card's mental health and could affect a diagnosis" by his experts). Indeed, until it bifurcated ineffective assistance claims in capital cases, the Ninth Circuit had expressly rejected any notion that trial counsel were obligated to uncover and present information to experts unless asked to do so. *Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997); *Hendricks v. Calderon*, 70 F.3d at 1038.

The impracticality of the rule established in this case was aptly demonstrated by the Ninth Circuit itself in *Hendricks* : "To impose a duty on attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert, would defeat the whole aim of having experts participate in the investigation." 70 F.3d at 1038. Simply put, counsel are entitled to rely on the opinions of experts hired to assist with the investigation. *See, e.g.*, *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir. 1998); *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998). That reliance is as appropriate in preparation for the sentencing phase of a capital trial as in any other aspect of an attorney's representation. Counsel is not required to second-guess the opinions offered by an expert nor is the attorney obligated to know more than the expert or to be independently aware of what information might assist an expert's evaluation of the defendant. The Ninth Circuit's conclusion that counsel should,

in fact, possess such clairvoyance is unsupported by any authority from this Court.

The per se requirement established in this case is a "long step down the path that leads to the courts' laying down a rigid protocol that criminal defense lawyers must follow if they are to escape being later deemed ineffective." *Thomas v. Gilmore*, 144 F.3d 513, 516 (7th Cir. 1998). Such an approach, however, is entirely inconsistent with this Court's recognition that there are "countless ways to provide effective assistance of counsel in any given case." *Strickland*, 466 U.S. at 689; *see also Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (courts must be careful "not to narrow the wide range of conduct" acceptable under the Sixth Amendment). Apart from the circuit conflict it creates, the Ninth Circuit's imposition of new duties on trial counsel violates *Teague* and warrants review by this Court.[5]

C. The Discovery Of Additional Potential Mitigating Evidence In Posttrial Proceedings Does Not Establish Ineffective Assistance Of Counsel

In *Strickland* the Court "adopted the rule of contemporary assessment of counsel's conduct . . . ." *Fretwell*, 506 U.S. at 372. That is, the reasonableness of counsel's actions must be assessed as of the time of trial rather than in reliance upon "second guessing with the benefit of hindsight." *White v. Singletary*, 972 F.2d 1218,1220 (11th Cir. 1992); *see also Coe*

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5. The circuit court also suggested that failure by an expert to make a proper inquiry into the defendant's background might violate *Ake v. Oklahoma*, 470 U.S. 68 (1985). 184 F.3d at 1118 n. 7. Every court to consider that argument, including the Ninth Circuit, has found it barred by *Teague*. *See, e.g., Harris v. Vasquez*, 949 F.2d 1497, 1518-1522 (9th Cir. 1990). Reframing the issue as one of ineffective assistance of counsel does not overcome the *Teague* problem. *Cf. Thomas v. Taylor*, 170 F.3d 466, 472 (4th Cir. 1999) (rejecting effort to "recast" claim of ineffective expert as claim of ineffective assistance of counsel).

v. Bell, 161 F.3d 320, 342 (6th Cir. 1998) (court should consider "the adequacy or inadequacy of counsel's actual performance, not counsel's (hindsight) potential for improvement"). Quite simply, the focus is "not upon whether counsel could have done a better job, but upon whether counsel provided the assistance necessary to ensure the fundamental fairness of the proceeding whose result is being challenged." *Resnover v. Pearson*, 965 F.2d 1453, 1460 (7th Cir. 1992). Once again the Ninth Circuit violates these basic limitations on review of ineffective assistance claims.

The circuit court decision is premised in part on an assumption that the discovery of "new" expert opinions during posttrial proceedings indicates that trial counsel was ineffective for not uncovering the same information. That assumption is in turn is driven by the court's apparent belief that the presentation of mental health evidence is an essential component of any penalty phase defense. *See* 184 F.3d at 1113 (the "bizarre circumstances of the crime suggest that Wallace may have been acting as a result of some mental infirmity, which might have constituted a mitigating circumstance"). This assumes, of course, that defendants are likely to benefit from efforts to explain brutal behavior through expert testimony. *See, e.g., Burris v. Parke*, 116 F.3d 256, 260 (7th Cir. 1997) ("jurors may not be impressed with the idea that to know the cause of viciousness is to excuse it"). In any event, a finding of ineffective assistance based on the development of new evidence long after trial violates the contemporary assessment rule.

The fact that a condemned inmate is able to uncover experts willing to testify on his behalf years after the trial is neither significant nor surprising. *See Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring). Given that "'[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most cases,'" *Medina v.*

California, 505 U.S. 437, 541 (1992), the existence of new or additional expert opinions cannot establish that counsel was ineffective at the time of trial. At most it demonstrates that various experts "simply arrived at a different conclusion, which is not surprising." *Brewer v. Reynolds*, 51 F.3d 1519, 1526 (10th Cir. 1995). More importantly, the Ninth Circuit's reliance on new experts to establish ineffective assistance ignores the admonition set forth in *Strickland*, *Burger*, and *Fretwell* to examine what counsel actually did at the time of trial and determine from that examination the objective reasonableness of counsel's actions. As demonstrated by Arizona, *see* Pet. at 13-15, the Ninth Circuit's approach is inconsistent with numerous cases from other circuits.[6]

The state trial is the "'main event,'" *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), while habeas corpus review is "secondary and limited." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). "Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Moreover, the states have a "compelling" interest in the finality of their criminal judgment. *Calderon v. Thompson*, 523 U.S. at 1501. Under the rule adopted by the Ninth Circuit no state death judgment can ever be truly final so long as habeas counsel can uncover any new arguably mitigating evidence. The opinion below is yet another example of the "'death is different' time warp," *Dobbs v. Zant*, 506 U.S. 357, 363 (1993) (Scalia, J., concurring in judgment), and further erodes respect for state court judgments.

By focusing on what habeas counsel have uncovered years later rather than considering what was actually done at the time of trial, the Ninth Circuit ignores the limitations of its federal

---

6. These concerns are exacerbated when a federal court bases its decision on evidence never presented to the state courts, as demonstrated by the second ground upon which Arizona seeks certiorari review.

habeas corpus jurisdiction. "Collateral review is not a *repechage* round in which the loser in one system of courts starts from scratch in another." *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1993). Certiorari should be granted in order to restore the proper balance to federal court review of challenges to state trial counsel.

CONCLUSION

For the reasons stated above amici respectfully request that this Court grant the petition for writ of certiorari.

Dated: November 18, 1999.

Respectfully submitted,

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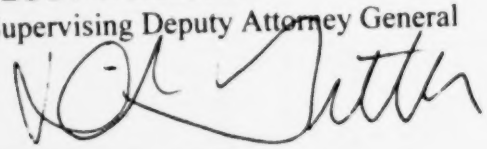

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No. 99-689

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

TERRY L. STEWART, Director, Arizona Department of Corrections,
Petitioner

v.

JAMES GRANVIL WALLACE, *Respondent*

CERTIFICATE OF SERVICE BY MAIL

DANE R. GILLETTE, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Suite 11000, in the City and County of San Francisco, State of California; that on November 19, 1999, he served three true copies of the Brief of Amici Curiae States of California, Alabama, Delaware, Georgia, Kansas, Missouri, Montana, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, and Washington in Support of Petition for Writ of Certiorari in the above-entitled matter on the respondent and by placing same in envelopes addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

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No. 99-689

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERRY STEWART, ET AL.,
PETITIONERS,

-vs-

JAMES GRANVIL WALLACE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit err in holding, contrary to *Strickland* and decisions by other circuit courts of appeal, that defense counsel had a duty in a capital sentencing proceeding to investigate and provide facts to the examining mental health experts that those experts do not request?

2. Did the Ninth Circuit err in holding, contrary to *Tamayo-Reyes* and decisions by other circuit courts of appeal, that a state court's refusal to hold an evidentiary hearing in collateral proceedings was itself "cause" justifying an evidentiary hearing and the presentation of new evidence before the district court?

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REASONS WHY THE WRIT SHOULD ISSUE

Wallace's brief fails to address the important issue in this case. The State of Arizona does not dispute that it is well established that counsel has a Sixth Amendment duty, in capital cases, to conduct a reasonable investigation into a defendant's background in search of possible mitigating evidence. The issue presented in this case concerns how that duty of counsel interrelates with the investigative duties of mental health experts hired to render opinions regarding a defendant's mental health at the penalty phase. Where does counsel's duty to investigate and develop information end and the expert's duty begin? Courts have acknowledged that the exact parameters of counsel's duty to investigate and present mitigating factors are difficult to ascertain. *Eddmonds v. Peters*, 93 F.3d 1307, 1323-24 (7th Cir. 1996) (citing *Stewart v. Gramley*, 74 F.3d 132, 135 (7th Cir. 1996)). The Ninth Circuit held in this case that counsel's duty to investigate extends beyond even what the expert requests. The Eleventh and Fourth Circuits have rejected that proposition and held that an attorney may rely on the expert to further that investigation. *See Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990) and *Smith v. Dixon*, 766 F.Supp. 1370 (E.D.N.C. 1991) *aff'd* 996 F.2d 667, 679 (4th Cir. 1993), *rev'd, en banc, on other grounds*, *Dixon v. Smith*, 14 F.3d 956 (4th Cir. 1994). Confusion regarding this extremely important issue, as demonstrated in this case, necessitates that certiorari be granted.

Wallace also alleges that the only matter at issue in Petitioner's petition for writ of certiorari concerns the Ninth Circuit's ruling granting Wallace an evidentiary hearing, and that this does not warrant certiorari review. This allegation is incorrect. The Ninth Circuit's opinion in this case went much further than simply ordering an evidentiary hearing; it announced a ruling of law that determined the standard to be applied in all capital cases in the circuit. In this case the court specifically held that attorneys have a duty, in capital sentencing proceedings, to investigate and provide facts to mental health experts examining their client that the experts do not even request. This holding clearly warrants certiorari review, as it is contrary to the holdings of other circuits and materially conflicts with *Strickland v. Washington*, 466 U.S. 668 (1984).

I

THERE EXISTS A CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHETHER COUNSEL HAS A DUTY, UNDER THE SIXTH AMENDMENT, IN CAPITAL SENTENCING PROCEEDINGS, TO INVESTIGATE AND PROVIDE INFORMATION TO THEIR MENTAL HEALTH EXPERTS THAT THE EXPERTS DO NOT REQUEST.

Wallace claims that the Ninth Circuit's ruling requiring counsel, in capital sentencing proceedings, to investigate and provide facts to their mental health experts, that the experts do not request, does not conflict with the rulings of other circuit courts. Wallace attempts to distinguish *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990) and *Smith v. Dixon*, 766 F.Supp. 1370 (E.D.N.C. 1991), *aff'd* 996 F.2d 667, 679 (4th Cir. 1993), *rev'd, en banc, on other grounds*, *Dixon v. Smith*, 14 F.3d 956 (4th Cir. 1994) without success.

Wallace alleges that *Card* is distinguishable because there mental health experts and counsel had conducted substantial investigation into the defendant's background, rendering counsel's failure to continue to investigate and uncover certain facts reasonable. This distinction fails. Like the defendant in *Card*, by the time of sentencing, Wallace's mental health had been examined by numerous professionals; one determined his competency to plead guilty, and the other three rendered opinions regarding his mental health at the time of the offenses. Wallace was also interviewed at length by the probation department as demonstrated by the degree of detail regarding his background that was included in his presentence report. None of the experts hired by Wallace's counsel (Couser) informed him that they were unable to render an accurate diagnosis with the information they had obtained through their interviews and testing, or which was otherwise available to them. None of them requested Couser to investigate further. All of them fully evaluated Wallace's mental health by interviewing and testing him, and they inquired into his background.

In preparation for sentencing, Dr. Bendheim evaluated Wallace at length, reviewed his background and his family history, and even interviewed him after placing him under the influence of sodium amytol. Despite his efforts, Dr. Bendheim was unable to uncover any evidence of classic insanity, and found no evidence of epilepsy or brain injury. Dr.

Bendheim concluded that Wallace had not been in a typical dissociative state during the murders, and he found no evidence of mental illness. Dr. Bendheim did not indicate that more testing or information was needed in order to render an accurate opinion.

Wallace's mental health was also examined before sentencing by two other psychiatrists hired by the court, Dr. James Little and Dr. Barry Morenz. Those doctors conducted an intense battery of tests and evaluated Wallace's family history, difficult upbringing, career in the military, prior marriage, and the results of prior testing that had been conducted in 1984, including the MMPI evaluation. Drs. Little and Morenz concluded that Wallace possessed an anti-social personality disorder, displayed a history of polysubstance abuse, and was very likely to reoffend. The doctors' joint report was submitted to the trial court at sentencing as an attachment to Wallace's presentence report. Neither of those doctors indicated that more testing or information was necessary in order to accurately evaluate Wallace's mental health.

Like the defendant in *Card*, there was nothing that was uncovered in any of these evaluations that should have alerted Couser to the fact that more information or investigation regarding Wallace's background was needed in order to obtain an accurate expert opinion of Wallace's mental health. The mental health experts did not request more information and they were able and willing to render their diagnoses with the information they had. Thus, *Card's* holding that counsel acts reasonably in failing to continue investigating a capital defendant's mental health at the penalty phase when multiple mental health experts, who are fully capable of obtaining information on their own, have rendered opinions without indicating any need for further information, applies to this case. The Ninth Circuit's opinion therefore conflicts with the opinion of the Eleventh Circuit and certiorari review is appropriate.

Smith is also directly applicable to this case and demonstrates a conflict between the Ninth and Fourth Circuits. There, the defendant claimed, like Wallace, that his counsel rendered ineffective assistance at the sentencing phase of a capital case by failing, among other things, to "consult with and fully inform the psychiatrists" who evaluated the defendant, and to request and review his mental health records. The district court made it clear that it was not the attorney's job to provide psychiatric experts with the information they needed to conduct their evaluations. *Smith*, 766 F.Supp.

at 1390. The court further noted that the fact that the doctor had obtained the necessary information himself in preparing his evaluation demonstrated that this was his task, and not the defendant's attorney's. *Id.* at 1391. This holding was affirmed by the Fourth Circuit. *Smith v. Dixon*, 996 F.2d at 679. Wallace's claim that *Smith* fails to demonstrate a conflict is erroneous. Contrary to Wallace's claim, the *Smith* court's failure to rule that counsel had rendered ineffective assistance of counsel did not alter the fact that the district court held, in that case, that defendant's attorney did not have a duty to provide unrequested information to his mental health experts.

II

THE NINTH CIRCUIT'S HOLDING IMPOSING A DUTY ON COUNSEL, IN CAPITAL SENTENCING PROCEEDINGS, TO INVESTIGATE AND PROVIDE UNREQUESTED INFORMATION TO THEIR EXPERTS MATERIALLY CONFLICTS WITH *STRICKLAND*.

A. DISTINCTION BETWEEN COUNSEL'S DUTIES AT THE GUILT AND PENALTY PHASES VIOLATES *STRICKLAND*.

Wallace attempts to justify the Ninth Circuit's imposition of a greater duty upon defense counsel, in capital proceedings, to provide information to their mental health experts at the penalty phase than at the guilt phase by contending that the scope and range of relevant evidence at sentencing in a capital cases is broader that at the guilt phase. The Ninth Circuit indeed held, in *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied*, 119 S.Ct. 2414 (1999), that this broadened pool of relevant evidence warranted the imposition of a greater duty upon counsel to investigate. This position is contrary to *Strickland*, wherein this Court rejected the suggestion that counsel's performance in capital sentencing proceedings should be judged under more rigorous standards than those applicable to the guilt phase. 466 U.S. at 686–87. Just because there is more evidence that might be relevant in the penalty phase of capital proceedings than at the guilt phase should not mean that defense counsel has any greater duty to investigate and provide that information to his experts. This Court has stated that counsel's duty to make "reasonable investigations" applies to both the guilt and penalty phases of capital proceedings; the Ninth Circuit's decision imposing a greater duty on counsel at the penalty phase that at the guilt phase materially

alters the standards for performance of counsel set forth by this Court and warrants certiorari review.

B. NINTH CIRCUIT'S RULING VIOLATES "CONTEMPORARY ASSESSMENT" RULE AND DECISIONS FROM OTHER CIRCUITS.

Wallace's characterization of the Ninth Circuit's holding as merely an application of the "reasonable investigation" requirement of *Strickland* is erroneous. Contrary to Wallace's assertions, the court of appeals based its holding that Couser had breached his "duty" to provide unrequested information to the mental health experts upon information obtained from post-sentencing examinations, rather than upon what was available to him at the time. Even assuming, arguendo, that Couser had a duty to provide such information to his experts, whether his failure to do so constitutes ineffective assistance of counsel can only be fairly evaluated based upon information readily available to him at that time, and not information gleaned years after the fact, and provided by new mental health experts after additional testing. The Ninth Circuit's ruling which permits counsel's performance to be evaluated based upon such information violates this Court's "contemporary assessment" rule articulated in *Strickland*, as well as the opinions of other circuit courts, as detailed in the Petition for Certiorari at pp. 12-15.

III

THE NINTH CIRCUIT'S DECISION TO HOLD A HEARING IN FEDERAL COURT AND TO ADMIT EVIDENCE NEVER PRESENTED IN STATE COURT OFFENDS PRINCIPLES OF COMITY AND MATERIALLY MISCONSTRUES *TAMAYO-REYES*.

Applying *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the Ninth Circuit found that the state court's failure to hold a hearing on Wallace's second petition for post conviction relief constituted "cause" justifying admission of new evidence in federal court. The Ninth Circuit held that Wallace had presented a colorable claim of ineffective assistance of counsel in state court, and that the state court's refusal to grant him discovery and a hearing constituted "cause" warranting a hearing and the presentation of new evidence in state court. The Ninth Circuit's holding is materially flawed in that the state court held that Wallace had *not* presented a colorable

claim for relief on his ineffective assistance of counsel claim, which is evident from the fact that it did not grant him a hearing on the claim. Whether Wallace's ineffective assistance of counsel claim was colorable or not was an issue of state law, for which federal review was unavailable. The Ninth Circuit's recharacterization of the claim as colorable was error, as it was not an issue reviewable in federal habeas corpus proceedings; the Ninth Circuit's use of that ruling to then establish "cause" justifying an evidentiary hearing materially altered this Court's holding in *Tamayo-Reyes*, and justifies certiorari review.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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CRM85-0678
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No. 99-689 (4)

In The
Supreme Court of the United States
October Term, 1999

TERRY STEWART, Director, Arizona Department of Corrections,
and MEG SAVAGE, Warden, Arizona State Prison - Florence Complex,
Petitioners,

v.

JAMES GRANVIL WALLACE,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where Respondent's background may have legitimate bearing on his mental state at the time of the capital offense, and hence on the existence of statutory and non-statutory mitigating factors, and where counsel failed to conduct any investigation of relevant and readily available facts from Respondent's background, did the Court of Appeals err in remanding the case for an evidentiary hearing on whether counsel's omissions constituted ineffective assistance of counsel?

2. Does the opinion of the Court of Appeals conflict with this Court's decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), on the issue of whether an evidentiary hearing should be held in federal court when Respondent has alleged facts in state court that, if true, entitled him to relief, but where the state court denied Respondent the opportunity to develop and present the claim by denying Respondent's request for investigative funds, expert assistance and an evidentiary hearing?

PARTIES TO THE PROCEEDING BELOW

The Petitioners Stewart and Savage are, respectively, the head of the Arizona State Department of Corrections as the Warden of the Arizona State Prison Complex at Florence. The Respondent Wallace is a prisoner in that system.

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals (Kozinski, J.) is reported at 184 F.3d 1112 (9th Cir. 1999), and is also contained as the Appendix A to the Petition here, as is the order of the district court, Appendix B.

STATEMENT OF JURISDICTION

The order of the district court denying habeas corpus relief was entered on January 24, 1997. The order of the Court of Appeals directing an evidentiary hearing on the issue of the effectiveness of counsel at sentencing was entered July 21, 1999. The Petition for Certiorari was filed on October 19, 1999. This Court has jurisdiction under 27 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The relevant passage of the Sixth Amendment of the Constitution of the United States is that "in all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." All agree that the lead discussion of this clause is found in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

STATEMENT OF THE CASE

Petitioner's statement of facts is both incomplete and inaccurate.[1] For that reason, we repeat here the relevant facts from the Court of Appeals decision below, for the Court's convenience:

> Petitioner, James Granvil Wallace, pleaded guilty to first degree murder and was sentenced to death. The circumstances of the crime are brutal and undisputed. .... Wallace has reported what he remembers of the murders and has never denied he was the perpetrator. Indeed, he insisted on pleading guilty in order to spare the victim's family the anguish of a trial.
>
> Nothing in the record explains Wallace's violent actions. The senselessness of the tragedy is underscored by the fact that the rational mind can find nothing that Wallace gained by destroying Susan Insalaco and her children. The bizarre circumstances of the crime suggest that Wallace may have been acting as a result of some mental infirmity, which might have constituted a mitigating circumstance under Arizona's death penalty sentencing scheme. Nevertheless, Wallace was sentenced to death for his crimes, and his principal claim in his federal habeas petition is that his counsel were ineffective in presenting the available mitigating evidence to the sentencing court....
>
> * * *
>
> Because Wallace admitted committing the murders and pleaded guilty, the only question left for trial was Wallace's sentencing. Exploring the defendant's mental state and other

[1] For example, contrary to Petitioners' statement of facts, Pet. at 5, Respondent did not insist on receiving the death penalty.

potential mitigating factors was clearly a central task for his counsel. Yet Wallace's lawyers devoted remarkably little time to this task. [footnote omitted]. Of the 45.9 hours Couser spent on Wallace's case, he spent 36 minutes conferring with Dr. Bendheim, and only 1.4 additional hours talking to other prospective witnesses for the sentencing hearing. He did not provide Bendheim with the MMPI results and he did not investigate what Drs. Little and Morenz referred to as Wallace's "very chaotic childhood." This information was easily within his reach: Wallace's three sisters have since signed affidavits saying they would have willingly provided information about Wallace's childhood and testified on his behalf, yet Couser never contacted them.

Curtis spent 45.25 hours preparing for Wallace's resentencing, including only about an hour interviewing witnesses. In his own words, he "conducted no factual investigation concerning ... potential mitigation [ ] or the appropriateness of the death penalty." [citation omitted].

Had they only looked, Couser and Curtis would have discovered a great deal about Wallace's family history, which Dr. Bendheim now describes as "one of the most dysfunctional family environments I have ever encountered." Wallace's mother was in and out of mental hospitals, diagnosed as psychotic, alcoholic and anorexic, among other things. On one occasion, she stabbed her husband in the head with a butcher knife. On multiple occasions, she tried to kill herself. She would disappear for weeks, and her children eventually would find her hidden naked somewhere in the house. On one particularly bizarre occasion, she resurfaced underneath Wallace's bed, naked and kicking so hard the bed bounced up and down. Wallace woke up the household with his screams. Wallace's father, a severe alcoholic, once "cold-cocked" his wife in front of Wallace and "stomped" repeatedly on her neck. Wallace himself sniffed glue and gasoline daily between the ages of ten and twelve, and experienced a "clinically significant series of head traumas" while growing up. Dr. David Lisak, who examined Wallace in 1993, concluded that "[t]he family and home in which Jim

> Wallace was raised was marred by an almost unimaginable level of chaos, neglect, bizarre and insane behavior, and by extreme violence between the parents."
>
> The sentencing judge saw only glimmers of this history, and received no evidence about its significance vis-a-vis mitigating circumstances.

Wallace v. Stewart, 184 F.3d 1112, 1113-1116 (9th Cir. 1999).

Based on these facts and others set forth in the opinion below, Respondent filed a petition for writ of habeas corpus in the district court in 1991, raising, among other claims, that he was denied the effective assistance of counsel at his capital sentencing hearing.[2] The District Court summarily dismissed the petition, and denied Respondent all relief, including his motions for discovery and an evidentiary hearing.

Judge Kozinski, writing for a unanimous panel of the Court of Appeals reversed the District Court's decision denying an evidentiary hearing on Respondent's claim of ineffective assistance of counsel at sentencing. The panel found that Respondent had made out a prima facie case that his lawyers were "less than competent at sentencing." *Wallace v. Stewart*, 184 F.3d at 1118.

> [W]ere the district court to accept all of [Respondent's] evidence, it could find that [Respondent's] lawyers were ineffective, and conclude that there is a reasonable probability that the death sentence would not have been imposed had they been effective.

---

[2] This case was pending before the 1996 enactment of the Antiterrorism and Effective Death Penalty Act, and thus, is not governed by those amendments. See *Lindh v. Murphy*, 117 S. Ct. 2059 (1997).

Id. For that reason, the panel properly remanded the case to the district court for an evidentiary hearing as to whether counsel was ineffective, and if so, whether Respondent was prejudiced. *Id.*

REASONS FOR DENYING THE PETITION

Nothing in the opinion below warrants this Court's certiorari review. It is not a decision on an issue of federal law that conflicts with a decision of another federal or state court. It is not a decision that incorrectly applies the law. It is instead a decision based on a careful and thorough review of the facts and evidence presented in the state and federal proceedings in this case, and a reasonable application of those facts to the settled law. In finding that Respondent had alleged facts that, if true, entitle him to relief on his claim of ineffective assistance of counsel, the Court of Appeals directed an evidentiary hearing on that claim. It is this order that is the subject of this Petition.

There is nothing final about the Court of Appeal's remand; it found only that were the district court to accept all of Respondent's evidence, it could find that Respondent's lawyers were ineffective. For these reasons, this Court should deny certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925)("We do not grant a certiorari to review evidence and discuss specific facts").

I. THE COURT OF APPEALS PROPERLY APPLIED STRICKLAND TO THE FACTS OF THIS CASE AND REMANDED FOR AN EVIDENTIARY HEARING ON THE INEFFECTIVENESS OF TRIAL COUNSEL.

Petitioners contend that, in remanding for an evidentiary hearing on the claim of ineffective assistance of counsel, the Court of Appeals did not apply the proper standard under *Strickland v. Washington*, 466 U.S. 668 (1984) and that its decision conflicts with decisions of other circuit courts. Petitioners are wrong on both counts.

A. Strickland Was Properly Applied By The Court Of Appeals.

Nothing in the Court of Appeals opinion conflicts with *Strickland.* The Court below properly applied the facts to the settled law of *Strickland* and concluded that if the facts as alleged in Respondent's affidavits are true, the federal court could find that Respondent was denied the effective assistance of counsel at his capital sentencing hearing. *Wallace v. Stewart*, 184 F.3d at 1118.

The essence of the State's argument here is that it is not up to counsel to investigate background facts about a person facing a capital sentencing; it is up to the expert. If, for example, the expert does not ask for facts about the bizarre behavior of Respondent's mother, or of Respondent's drug and alcohol use beginning in pre-adolescence, or of his corrosively dysfunctional family environment, counsel has no duty to learn them.

Strickland does not support the State's argument. *Strickland* holds that the standard of competence for a capital sentencing case is the same as that for an ordinary

trial. This means that counsel must make reasonable investigations. 466 U.S. at 691. Thus, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances..." *Id.* Here, the Court of Appeals, on close analysis of the record and with specific reference to the facts, concluded that counsel had not performed that function. Although "[t]his information was easily within ... reach," neither counsel ever spoke to or contacted any member of Respondent's family or gathered any records of any kind about Respondent or his family. *Wallace v. Stewart*, 184 F.3d at 1116.

Even in the face of this evidence, however, none of which was contradicted by the State, the Court of Appeals did not preordain any result; it merely remanded for an evidentiary hearing to allow the state "an opportunity to cross-examine [Respondent's] affiants, or to present evidence of its own." *Id.*, 184 F.3d at 1118.

This decision in no way "alters" the second – "deficient performance" – prong of *Strickland*, as the State claims. Rather, the Court of Appeals looked at counsels' performance at the time of their representation of Respondent, and concluded, unsurprisingly, that the circumstances did indeed require counsel to investigate Respondent's background. The need to conduct a reasonable investigation for the penalty phase of a capital case is not a novel concept and is unequivocally consistent with *Strickland*, as numerous courts have repeatedly held. *See e.g., Thomas v. Kemp*, 796 F.2d 1322, 1324 (11th Cir.), *cert. denied*, 479 U.S. 996 (1986) (counsel ineffective where little

effort made to investigate possible sources of mitigation evidence, including no attempt to obtain possible mitigation testimony from other family members or individuals who knew defendant).

Next, and contrary to the State's baseless and somewhat furtive claim, the Court of Appeals' decision, does not require counsel to "possess a heightened level of expertise in the sentencing phase." Pet. at 11. It merely acknowledges the unremarkable principle that the scope and range of relevant evidence at the sentencing phase of a capital case is different, and broader, than that necessary to determine the mental state of a defendant at the guilt/innocence phase. *Wallace v. Stewart*, 184 F.3d at 1117 n.5. That is because the central issue at the guilt/innocence phase is establishing whether the necessary elements of the crime have been proven beyond a reasonable doubt. At punishment, the factfinder is not so limited, but must consider, as a matter of Eighth Amendment law, a "myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1007-08 (1983). *See also Barclay v. Florida*, 463 U.S. 939, 950 (1983) ("moral, factual, and legal judgments ... play a meaningful role in sentencing"); *Williams v. New York*, 337 U.S. 241, 247 (1949) (contrasting "narrow issue of guilt" to sentence based on "fullest information possible"). As this Court explained:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged

> background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

Penry v. Lynaugh, 492 U.S. 302, 319 (1989), *quoting California v. Brown*, 479 U.S. 538, 545(1987)(O'Connor, J., concurring). *See also Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)(holding that evidence of serious emotional problems in a young defendant "does not suggest an absence of responsibility for the crime of murder," but it may have great mitigating weight at sentencing).

B. No Conflict In The Circuits Exists.

The Court of Appeals opinion also does not conflict with decisions from other courts, state or federal. The two cases Petitioner cites for the purported conflict not only show no such conflict, but in fact support the decision of the court below.

In *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990), the circuit court held that counsel was not ineffective at sentencing where his testifying mental health expert had at least the following information relating to Card's mental health:

> (1) a report from a psychologist, finding the defendant competent to stand trial, sane at the time of the offense and appeared to have known the difference between right and wrong;
>
> (2) a report from a psychologist, after a four hour evaluation, detailing the results of psychological tests, concluding that the defendant suffered personality and behavior problems, and agreeing that he was competent to stand trial , not insane, and knew the difference between right and wrong;
>
> (3) two reports from another mental health expert finding the defendant competent to stand trial, "detailing aspects of his

> background, including his criminal record, violence, and infliction of self injury;"
>
> (4) an oral report from a mental health expert concerning his interview with the defendant's parents and other information ; and
>
> (5) the testifying mental heath expert's own examination of the defendant, results of tests administered and his own conversation with family members.

Id., 911 F.2d at 1512. Based on these facts, the Circuit Court concluded that trial counsel was not ineffective in failing to gather other records and providing the experts more detailed information from family members, and also noted that "it is unclear that, even had these materials been provided to experts, their evaluations of [the defendant] would have differed." *Id.*

No such facts exist here. Neither Respondent's sentencing counsel, nor any mental health expert, ever gathered any records concerning Respondent, or spoke with any member of his family. The only information Dr. Bendheim had when he testified at the capital sentencing hearing came from a brief interview with Respondent and the presentence report that he perused while waiting to testify.[3] The only information Dr. Gurland had when he testified at the resentencing on one of the convictions was Dr. Bendheim's previous testimony and some police reports.

[3] Trial counsel spent only half an hour conferring with Dr. Bendheim .

In addition, all the testifying experts, both from the defense and the state, have said that the information obtained from the investigation into Respondent's background is not only relevant and material, but would have significantly impacted their testimony and conclusions. For example, the State's expert, Dr. Morenz now concludes that Respondent suffers from multiple mental disorders, and at the time of the murders, his capacity to conform his conduct to the requirements of the law was significantly impaired.

As discussed above, the ruling of the Court of Appeals not only tracks the law of the Eleventh Circuit, but of other circuits as well. *See, e.g., Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir.), *cert. denied*, 516 U.S. 946 (1995) (defendant prejudiced from counsel's failure to conduct reasonable investigation into defendant's background for the penalty phase); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (counsel ineffective where he had "small amount of information regarding possible mitigating circumstances regarding [petitioner's] history, but ... inexplicably failed to follow up with further interviews and investigation"); *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988) (resentencing required where trial counsel did not introduce evidence of defendant's background at sentencing and lack of investigation resulted in the failure to uncover "an overwhelming amount of documentary mitigating evidence"); *Stephens v. Kemp*, 846 F.2d 642 (11th Cir.), *cert. denied*, 488 U.S. 872 (1988)(counsel's performance deficient where counsel failed to investigate defendant's mental history and conditions

despite his knowledge that defendant had spent time in a mental hospital, and failed to explain relevance of mitigation, elicited by trial judge, from testimony of defendant's mother); *Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir. 1995), *cert. denied, sub nom, Bowersox v. Antwine*, 116 S. Ct. 753 (1996) (counsel ineffective for failing to effectively present evidence of petitioner's mental impairment at penalty phase of capital trial); *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1990) (counsel ineffective at capital sentencing for failing to fully investigate defendant's family and mental history); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), *cert. denied*, 117 S. Ct. 273 (1996) (counsel ineffective at sentencing for failing to develop and present evidence regarding petitioner's difficulties in school, brain damage and that he was a follower).[4] Rather than being anomalous, the Court of Appeals' ruling marches lockstep with other circuits in applying *Strickland.*

The only other case Petitioners cite for a purported conflict on this point, *Smith v. Dixon*, 766 F. Supp. 1370 (E.D.N.C. 1991), *aff'd*, 966 F.2d 667, 679 (4th Cir. 1994), *vacated on other grounds*, 14 F.3d 956 (1994), also offers no support. There, the district

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[4] Petitioners also refer in a parenthetical to the Eleventh Circuit's decision in *Hill v. Moore*, 175 F.3d 915, 926 (11th Cir. 1999), as apparent support for a "conflict" with the Court of Appeals decision. There the circuit court concluded that counsel was not ineffective in failing to present evidence of childhood neglect where "[t]he extent of his proffer in this regard is that his mother often gave him 'good whippings'" *Id.* It also concluded that "[g]iven the time the court-appointed psychologist invested in his evaluation of petitioner, information, if it existed, about the defendant's background could have been discovered. No such slight or speculative facts are present here. The facts counsel failed to investigate and present here are material and certain, and the resulting prejudice to Respondent, is known.

court concluded that trial counsel were not ineffective at sentencing where the allegations made against them proved untrue. Although post-conviction counsel claimed that trial counsel were ineffective for failing to obtain certain records and conduct certain tests, the records in fact were obtained and the tests were in fact conducted. In addition, the testimony of the two experts at sentencing showed that they, too, were in fact properly prepared, and the jury's finding of the emotional disturbance factor demonstrates the effectiveness of the psychiatric testimony.

Here, in stark contrast, no background records on Respondent were gathered by counsel, or any expert, and, other than an MMPI, the results of which were not disclosed to either Dr. Bendheim or Dr. Gurland, no testing of any kind was conducted. Not unexpectedly, given the absence of information, the factfinder here, unlike in *Smith v. Dixon*, found no mitigating evidence concerning Respondent's mental state at the time of the crime or of his extremely dysfunctional background.

In short, the Court of Appeals decision that the duty to investigate background facts that bear on mental conditions, where this may be an issue, is squarely upon counsel – a ruling reaffirmed by repeated decisions, not only by the Eleventh and Fourth Circuits, but by many others circuit courts as well. "An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence," *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir.1994), and

"[t]he failure to do so may render counsel's assistance ineffective." *Baxter v. Thomas*, 45 F.3d at 1513 (quotation and citation omitted).

II. THE COURT OF APPEALS OPINION BELOW DOES NOT CONFLICT WITH *TAMAYO-REYES.*

Petitioners' second contention is that the Court of Appeals erred in holding, contrary to *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), that the state-induced failure of Respondent to present in state post-conviction proceedings all of the evidence he was subsequently able to gather and present in federal court, prohibited him from presenting this evidence in federal court and prohibited the district court from considering this evidence. This argument is ludicrous.

Applying the precepts of *Tamayo-Reyes*, the Court of Appeals meticulously restricted the availability of an evidentiary hearing in federal court to cases in which petitioners raise a colorable claim and demonstrate (1) cause for not having fully developed the factual basis of that claim in state court and (2) prejudice.

The Court of Appeals below painstakingly considered and distinguished *Tamayo-Reyes.* As noted, Respondent had alleged in the state court a colorable claim that he was denied effective assistance of counsel at his capital sentencing, and it was there rejected on the merits – in spite of the fact that Respondent was given no opportunity to develop or present all the facts supporting his claim. Thus the Court of Appeals held that Respondent "fulfilled the cause prong of *Keeney* because he properly presented a colorable claim, and the state court denied him an evidentiary hearing." *Wallace v.*

Stewart, 184 F.3d at 1116, n.4. The Court of Appeals also held that the prejudice prong was satisfied because there was "a reasonable probability that the state courts would have granted him relief, had he been allowed to develop the evidence." *Id.*

Petitioners' position here willfully ignores two critical facts, both of which demonstrate the deficiencies of their argument. First, after alleging a colorable ineffectiveness of counsel at sentencing claim in state court, Respondent "moved for the appointment of an investigator, an evidentiary hearing and funds for mental health experts." *Id.* He supported his motions with affidavits from Dr. Bendheim, Dr. Gurland, and one of Respondent's sisters – all of which the Court of Appeals found to be compelling and which demonstrated a need for further investigation and expert assistance – as well as with records showing that no investigation of Respondent's background had ever been conducted by his prior counsel. In spite of this evidence, the state court denied Respondent's motions for an investigator and for mental health experts. The state court also denied Respondent's motion for an evidentiary hearing. *Id.* Thereafter, having denied Respondent the opportunity to develop all the facts supporting his claim, the state court denied the claim on the merits. *Id.* Thus, Respondent's attempts to present facts supporting his claim in state court were rebuffed by the state.

Second, and not surprisingly, none of the cases cited by Petitioners support their position that *Tamayo-Reyes* requires a habeas petitioner to present all the facts supporting his claim in state court – where the state court prevented him from doing so – before any

of that evidence can be considered by a federal court in determining whether an evidentiary hearing should be held. They don't because that argument is a reduction to the absurd.

Tamayo-Reyes presumes a failure to fully develop facts in state court – a point that is explicit in its holding. A petitioner is "entitled to an evidentiary hearing [in federal court] if he can show cause for his failure to develop the facts in state court proceedings and actual prejudice resulting from that failure." 504 U.S. at 11, 112 S. Ct. at 1721 (emphasis added). *See, e.g., Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997) ("Having tried and failed through no fault of his own to develop the facts relevant to his ineffective assistance claim at the state-court level in the only permissible manner, he clearly establishes the "cause" portion of the Keeney "cause and prejudice" test); *Spitzweiser-Wittgentstein v. Newton*, 978 F.2d 1195, 1196 (10th Cir. 1992) (evidentiary hearing warranted when failure to develop facts of petitioner's claim not attributable to inexcusable neglect). *Cardwell v. Greene*, 152 F.3d 331, 337 (4th Cir. 1998) (where petitioner sought a hearing in state court but was denied, federal evidentiary hearing not precluded because petitioner "diligently sought to develop the factual basis of a claim . . ."); *McDonald v. Johnson*, 139 F.3d 1056, 1059 (5th Cir. 1998) ("a petitioner cannot be said to have 'failed to develop' a factual basis for his claim unless the undeveloped record is a result of his own decision or omission"); *Love v. Morton*, 112 F.3d 131, 136 (3rd Cir.

1997) (petitioner did not fail to develop factual basis for claim where judge made it impossible for him to develop the record).[5]

After a thorough examination of the facts and record here, the Court of Appeals found that Respondent's failure to fully develop the factual basis of his claim in state court was not due to his own lack of effort. Rather, the Court of Appeals concluded that Respondent had shown both cause and prejudice. Under *Tamayo-Reyes*, therefore, he is entitled to an evidentiary hearing.

CONCLUSION

As the court below concluded, "To descend to the level of ineffective assistance of counsel, a lawyer's performance must be poor indeed.... Respondent has made out a *prima facie* case that [counsel] were less than competent at sentencing." The decision of the court below to remand this matter to the district court for hearing was fact intensive; reasonably meditated, accords with numerous other circuit decisions on the duties of counsel in capital sentencing cases, and need not be reviewed here. The Petition for a Writ of Certiorari should be denied.

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[5] As noted, this is a pre-Act case, and thus, § 2254(e)(2) does not apply here. Nonetheless, these cases, interpreting the amendment to this statutory provision as codifying *Keeney v. Tamayo-Reyes'* "inexcusable neglect" standard, are instructive.

RESPECTFULLY SUBMITTED this 22nd day of November, 1999.

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